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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DETECTIVE RICHARD MCKINLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, PETITIONER

v.

THEODORE W. WHITE JR.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether civil liability should attach to a law enforcement official under 42 U.S.C. § 1983 when the law enforcement official disclosed potential impeachment evidence to the prosecutors who then intentionally withheld the information from the criminal defendant?

2. Whether a punitive damages award that results in the financial ruin of a defendant is unconstitutional as excessive and a violation of a defendant's due process rights?

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The petitioner, Detective Richard McKinley, Individually and in his official capacity, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals, Eighth Circuit, filed May 17, 2010.

OPINIONS BELOW

The opinion of the Eighth Circuit to which this petition relates was filed on May 17, 2010, and is attached as Appendix A. It is reported at *White v. McKinley*, 605 F.3d 525. Previously petitioner appealed the district court's denial of his motion for summary judgment based on qualified immunity. The prior opinion of the Eighth Circuit is reported at 519 F.3d 806 and is attached as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals, Eighth Circuit to be reviewed was filed on May 17, 2010. A Petition for Rehearing and Rehearing En Banc was timely filed and was denied on June 28, 2010. This petition is filed within 90 days of the denial of the Petition for Rehearing and Rehearing En Banc. Rule 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

U.S.C.A. Const. Amend. XIV Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Theodore White was charged in 1998 with molesting his adopted daughter, Jami. White was convicted of those charges in 1999 but in 2002 the conviction was reversed by the Missouri Court of Appeals because the prosecutors did not give White material evidence known to the prosecutors which was favorable to White. *State v. White*, 81 S.W.3d 566 (Mo.Ct.App. 2002). The state appellate opinion is relevant in that it found that the prosecutors violated White's constitutional rights, but since prosecutors continue to enjoy absolute immunity, White's recourse for monetary damages was limited to seeking compensation from petitioner, the detective who revealed the information to the prosecutors, who then intentionally refused to disclose the information to White.

The state appellate court reversed White's criminal conviction after finding that the prosecution knew for nearly a year, but decided not to disclose to White, that detective McKinley, who had investigated the allegations of molestation against White, had begun a relationship with White's wife shortly after White was arrested. The detective told the prosecution about the relationship after White was arrested. But the prosecution made the decision that the information was irrelevant and immaterial and did not disclose the information to White at any time prior to White's trial and conviction. The State's silence included being present when the detective testified in his deposition that he had no interest in the outcome of White's criminal case. White did not find out about the relationship until a third party told White's counsel after White was convicted. *State v. White*, 81 S.W.3d at 565.

Upon appeal of White's conviction, the State argued that the relationship was not material to the case because it began only after the assertions of the claims of sexual abuse were made. The state appellate court disagreed and found because of the State's conduct in withholding from White information about the relationship between White's wife and the investigating detective, the State violated its duty to White under *Brady v. Maryland*, 373 U.S. 83 (1963). *State v. White*, 81 S.W.3d at 568. The state appellate court found that the State's assumption that the relationship was immaterial because the relationship began after the accusations were made was incorrect "because the relationship itself" raised questions that could have pursued in his defense. *State v. White*, 81 S.W.3d at 570.

In a subsequent criminal trial where that evidence of the relationship was disclosed to the jury, White was found not guilty. White then brought the underlying civil action under 42 U.S.C.A. §1983 against McKinley, the detective who had investigated the allegations of abuse and who had developed a relationship with White's wife. White sought damages against petitioner claiming his constitutional rights were violated by McKinley's failure to reveal evidence that petitioner and respondent's wife had become involved in a relationship. Petitioner took the position that he had disclosed the information to the prosecution, who then intentionally refused to reveal the information to White. Petitioner filed a motion for summary judgment claiming that qualified immunity shielded him from having to go to trial. The district court denied the motion for summary judgment and this court in a prior opinion affirmed the denial of summary judgment. *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008).

The case proceeded to trial and the jury returned a verdict in favor of respondent for $14,000,000,000 actual damages and $1,000,000 punitive damages against petitioner who only has a net worth of $31,000. The district court awarded attorneys' fees in the amount of approximately $1,400,000. Petitioner moved that the district court enter judgment in his favor or for new trial or to amend the judgment as excessive. The district court denied the relief and petitioner appealed. The 8th Circuit affirmed the judgment in all respects on May 17, 2010. A Petition for Rehearing was timely filed on and was denied on June 28, 2010.

REASONS FOR GRANTING THE PETITION

Review Is Necessary to Keep A Criminal Defendant's Right to Potential Exculpatory or Impeachment Evidence Inviolate.

No case before this one has extended § 1983 liability to a law enforcement officer for failing to disclose potential impeachment evidence, when the officer disclosed the information to the prosecutors, who then repeatedly and intentionally withheld the information from the criminal defendant. The dangers of the underlying 8th Circuit appellate opinion are several. First, it not only improperly extends liability to law enforcement officers who have discharged their duty to disclose potential impeachment and exculpatory evidence, but it gives prosecutors judgment and discretion of nondisclosure not currently afforded or intended under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its progeny. Second, it encourages prosecutors to hide behind official immunity and excuse their nondisclosure by accusing law enforcement of not telling the prosecution enough information to trigger disclosure. Third, in order for law enforcement officials to avoid potential future civil § 1983 liability, it requires law enforcement to disclose potential impeachment and exculpatory information directly to the criminal accused. Fourth, it results in the erosion of this country's long adherence to the inviolate right of a criminal defendant to potential exculpatory or impeachment evidence held by the prosecution.

A. Prosecutors have an absolute duty to disclose potential impeachment or exculpatory evidence to the accused.

Prosecutors have an absolute duty to disclose potential impeachment or exculpatory information to the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) and *United States v. Bagley*, 473 U.S. 667, 676 (1985). This Court has explained the constitutional right: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87.

The prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The duty of disclosure is not limited to evidence the prosecutor is aware of, but also includes evidence known only to police officers and not to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Accordingly, under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437.

This affirmative duty reaches to require disclosure of impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).This Court has stated in *California v. Trombetta*, with respect to the Due Process Clause of the Fourteenth Amendment: "We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." 467 U.S. 479, 485 (1984).

Though prosecutors have an absolute duty to disclose potential exculpatory and impeachment evidence to the criminal accused, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), they continue to enjoy absolute immunity in most circumstances because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process." *Imbler v. Pachtman*, 424 U.S. 409, 431 n. 34 (1976).

Brady's protections also extend to actions of other law enforcement officers, however, an officer's failure to preserve or disclose potential exculpatory or impeachment evidence does not constitute a denial of due process in the absence of bad faith. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). "[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial." *Id.*

B. Review is necessary because the 8th Circuit shifts the burden of disclosure to law enforcement directly to the criminal defendant

The danger of the underlying case is that the appellate court lost focus on the defendant's absolute right to the potential exculpatory or impeachment evidence when analyzing whether civil liability should attach to a law enforcement officer when it was the prosecution who held and refused to disclose the potential impeachment evidence to the criminal defendant. Petitioner discharged his duty to disclose potential impeachment evidence by disclosing the information to the prosecutor. *Hauptman v. Wilentz*, 570 F.Supp. 351, (D.N.J. 1983); *Freeman v. State of Georgia*, 599 F.2d 65, 69 (5th Cir. 1979). There is no independent duty of a law enforcement officer to disclose potential impeachment evidence directly to the criminal defendant, however, the import of the 8th Circuit opinion do just that. This shift in the duty of disclosure is misplaced and review by this Court is necessary.

The prosecutor withheld the *Brady* information from respondent. The prosecutor, not petitioner, caused injury to respondent. *See Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994); *Michaels v. McGrath*, 222 F.3d 118 (3rd Cir. 2000); *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001); and *Porter v. White*, 483 F.3d 1294, 1308-11 (11th Cir. 2007)(court found that plaintiff failed to show an "affirmative causal connection" between the county investigator's conduct and the denial of due process occasioned by the *Brady* violation).

The finding of liability by the 8th Circuit in this case erodes the protection previously afforded to defendants and it imposes an insuperable burden on law enforcement officials to disclose. To hold petitioner liable for the continued and intentional actions of the prosecutors creates a slippery slope that erodes the longstanding protection criminal defendants are entitled to, and imposes an impossible burden on law enforcement for disclosure, and an impossible burden to defeat civil liability for failure to disclose. *Villasana v. Wilhoit*, 368 F.3d 976, 979-981 (8th Cir. 2004); *United States v. Comosana*, 848 F.2d 1110, 1115 (10th Cir. 1998).

Liability in this case is improperly premised upon a finding that the detective lied to the prosecutor about when the relationship began, ignoring the fact that the detective admitted and disclosed to the prosecutor that a relationship existed. Respondent was entitled to know of the existence of the relationship—something that the prosecutor continued to know about and intentionally withheld. Had the prosecutor disclosed the relationship at any time prior to or even during trial (the relationship which the prosecutor admitted continued to exist and grow), respondent could have investigated all relevant issues attendant to the diary and any relationship between his wife and the detective and impeached both prior to deposing the detective or being tried on the criminal charges. This was the analysis correctly undertaken by the state appellate court which resulted in the reversal of respondent's criminal conviction.

The 8th Circuit improperly centered its analysis of whether liability attached to petitioner based upon whether there was evidence intentionally lied to the prosecutor about when the relationship began. This analysis improperly presupposes that petitioner violated or failed to discharge his duty to disclose, which then leads to an improper finding of causation. The factual issues of whether the evidence supports a finding petitioner acted in bad faith are not reached if he discharged his duty to disclose and the prosecutor's intentional refusal to disclose impeachment evidence caused respondent's injuries.

Under *Brady*, the prosecutor had an absolute obligation to disclose to respondent the information revealed by petitioner. The focus on whether petitioner lied about when the relationship began results in improperly affording the prosecutor judgment and discretion on deciding whether and when to reveal the information. This leads to the most unfair of results. Respondent never knew what the prosecutor knew before he deposed petitioner, went to trial, and was convicted. Had the prosecutor revealed what petitioner disclosed, respondent could have done the full investigation he did after conviction but before ever even deposing petitioner or going to trial. This was recognized by the state appellate court as it formed the basis for the reversal of respondent's criminal conviction.

I. Review is necessary to prevent the imposition of punitive damages that cause defendants financial ruin

The $1,000,000 punitive award against petitioner who has a net worth of $31,000 is unconstitutionally excessive and violates petitioner's due process rights. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Though there is no mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would necessarily fit every case, in this case the punitive damage award against petitioner transcends the constitutional limit. *Id.*, at 583, 585-586. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). A punitive damages award should not result in the financial ruin of the defendant. *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985).

The 8th Circuit rejected petitioner's claims of excessiveness of the punitive award because petitioner failed to raise the issue in his post-judgment motions filed before the district court. However, even plain error permits review because petitioner's rights are substantially affected and the award represents a miscarriage of justice. *See Moore v. American Family Mut. Ins. Co.*, 576 F.3d 781, 786 (8th Cir. 2009) (plain error relief may be granted when a party's substantial rights are affected and when the error seriously affects the fairness, integrity or public reputation of judicial proceedings); *Monteagudo v. Asociacion de Empleados Del Estado Libre Asociado De Puerto Rico*, 554 F.3d 164, 175 (1st Cir. 2009) (where claim of excessiveness of punitive damages is not preserved it is reviewed for plain error to see if error is plain, prejudicial, affects substantial rights and review necessary to prevent miscarriage of justice); and *Morganroth & Morganrogh*, 123 F.3d 374, 386 (6th Cir. 1997) (punitive damage award can be reviewed under plain error).

This Court has rejected a mathematical bright line approach to the award of punitive damages. *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. at 18; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, ---- (1993) (rejecting "an approach that concentrates entirely on the relationship between actual and punitive damages"). Instead, this Court has indicated that an award should be reasonable in light of various considerations, such as the magnitude of harm caused or potentially caused and the net worth of the defendant. *See TXO*, 509 U.S. at ---- & n. 28. An award should not result in the defendant's financial ruin. *Vasdinder v. Scott*, 976 F.2d 118, 121 (2nd Cir. 1992); *Arceneaux v. Merrill Lynch, Pierce, F. & S.*, 767 F.2d 1498, 1503 (11th Cir.1985); *CEH, Inc. v. F/V Seafarer* 70 F.3d 694, 706 (C.A.1 (R.I.) 1995).

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 09-1945

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Theodore W. White Jr., Appellee,

v.

Detective Richard McKinley, Individually and in his official capacity, Appellant,

Tina McKinley, Defendant.

January 12, 2010, Submitted
May 17, 2010, Filed

Before SMITH and COLLOTON, Circuit Judges, and KORNMANN,[1] District Judge.

SMITH, Circuit Judge.

Theodore White, Jr. brought this civil action following his prosecution, conviction, re-prosecution, and eventual acquittal for the alleged molestation of his adopted daughter. White sued his ex-wife, Tina McKinley ("Tina"), and Richard McKinley, the police officer who investigated the molestation charges and Tina's current husband. White alleged a deprivation of his constitutional rights and various common law torts. McKinley moved for summary judgment on all counts, claiming qualified immunity.[2] The district court[3] denied McKinley's motion as to the (1) 42 U.S.C. § 1983 conspiracy claim and (2) § 1983 claim based on suppression of exculpatory evidence.[4] On interlocutory appeal, we affirmed the district court's denial of summary judgment. *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008) ("*White I*"). At trial, the jury found that McKinley violated White's due process rights and conspired with Tina in violating White's rights, and it assessed actual damages of $ 14 million and punitive damages against both McKinley and Tina of $ 1 million each. McKinley appeals,[5] arguing that the district court erred in denying his (1) motion for judgment as a matter of law because he disclosed potential impeachment evidence to the prosecutor who intentionally withheld the information from White and (2) motion for a new trial because the district court improperly excluded large categories of evidence from the jury's consideration. He also asserts that the punitive damages award of $ 1 million is excessive and violates his due process rights in light of his net worth of $ 31,000. We affirm.

I. *Background*

"We recite the facts in the light most favorable to the jury's verdicts." *United States v. Hayes*, 574 F.3d 460, 465 (8th Cir. 2009) (internal quotations and citation omitted).

White married Tina in 1991. At that time, Tina had custody of her two children--Jami and Danny--from a previous marriage. White agreed to adopt Jami and Danny, but their biological father initially would not agree to the termination of his parental rights. In 1995, the biological father changed his mind and permitted White to adopt both children. When an acquaintance asked Tina why the children's biological father agreed to the termination of his parental rights, Tina replied that she had threatened to charge him with child molestation if he did not cooperate. White adopted Tina's children in January 1996.

Over time, financial difficulties precipitated marital difficulties. The marriage deteriorated in the fall of 1997 and resulted in fights, some of which the children witnessed. On September 24, 1997, while White was gone, Tina and her children packed White's belongings in garbage bags, put the garbage bags in the garage, and barricaded the entrance from the garage to the kitchen. When White returned home, he broke down the door and went to his bedroom. Tina contacted the Lee's Summit Police Department ("the police department") to report that White had broken through the door but added a fictitious story that he shoved her. Because both Jami and Danny were with Tina when she heard the garage door opening, they were present when White entered the kitchen and knew that Tina's report was false.

A few days after the incident, Nina Morerod, the family's nanny, saw McKinley at the family's house. Tina had told Morerod that someone was coming to repair the door.[6] While Morerod was at Tina's home, two men came to the home to measure the door and prepare an estimate for repair of the broken door frame. Morerod testified that she talked to only one of the men, whom she identified as McKinley. On March 21, 1998, Tina reported to the police department that White had been molesting Jami, then age 12, for years. McKinley was assigned as the lead investigator, which was the role that he usually took in sexual abuse investigations for the police department.

During his investigation, McKinley found Jami's diary. Jami wrote in her diary that White was a good father and that she wished that he would spend more time with her. She also wrote that Tina did not love her the way that she loved her sons and that Tina could not even put her arms around Jami. In the diary, Jami stated that she hated her mother for making her responsible for babysitting her younger brother. The standard practice for a detective who discovers such a writing in the course of investigating child sexual abuse allegations is to seize it and preserve it as evidence. Nevertheless, McKinley failed to seize it. In his police report, McKinley failed to mention that he had read the diary, thereby omitting from the report Jami's potentially exculpatory statement about White being a good father. Thereafter, the diary disappeared. Prior to the criminal trial, White's attorney requested that the prosecutor provide the diary as evidence for the defense. Jennifer Mettler, the prosecutor, then called Tina, told her that White wanted the diary, and asked her to get it. Tina subsequently informed Mettler that Jami no longer had the diary. However, Jami contradicted Tina. Jami denied that she was ever asked to look for the diary and did not recall seeing her diary after McKinley had it. According to Jami, Tina knew where Jami kept the diary.

As part of his investigation, McKinley also took the unusual step of meeting with Jami and discussing the sexual abuse allegations with her in advance of the required interview by the Center for Protection and Children (CPC). A meeting between a detective and a child witness before the CPC interview is improper and violates a "very serious" rule for the police department's detectives. All cases of alleged child molestation in

Jackson County are referred in the first instance to the CPC. Detectives must not interview the child until after the CPC exam, as the CPC interviewers are specially trained to take a statement from the child about the abuse allegations. The interview is also videotaped and used as evidence at the criminal trial. The CPC records interviews so that all parties can observe whether the interviewer asked leading questions. For similar reasons, a detective must document his or her contacts with the child and must not have an undocumented meeting with a child. McKinley never disclosed his pre-CPC meeting to the prosecutors.[7]

In June 1998, McKinley disclosed to the police department's chief of police that McKinley was investigating a child sexual abuse case and had begun a relationship with the mother of the victim. The chief directed McKinley to disclose his relationship with Tina to the prosecutor. McKinley then informed Prosecutor Jill Kanatzar that he had a one-time social encounter with Tina that occurred *after* charges were filed against White in April 1998. At that time, McKinley did not disclose to Kanatzar that he had actually been on several dates with Tina and was having a sexual relationship with her.

At the end of June 1998, Kanatzar left the prosecutor's office, and Mettler replaced Kanatzar on the case. During the fall of 1998, near White's first trial setting, Mettler met with Tina and questioned her about her relationship with McKinley. Mettler asked Tina about "the one or two times" that McKinley and Tina had dated. In response, Tina stated that she and McKinley were presently seriously dating and were planning on marrying. Mettler reported that information to her superiors in the prosecutor's office. The prosecutor's office determined that it was unnecessary for Mettler to disclose to the defense the existence of the relationship because, *based on McKinley's and Tina's representations*, "the relationship had not begun until after the case was already filed and charges had been filed." McKinley and Tina had told Mettler that there was no connection between the two of them prior to the investigation and that the relationship did not start until after the investigation was completed. They had also told Mettler that Tina's children did not know that she was dating McKinley and that they were taking steps to keep such information from the children.

At trial, Tina's coworker, Claudia Baker, and Tina's supervisor, Kevin Huffman, contradicted McKinley and Tina's account. According to Baker, in the fall of 1998, Tina told her that she was getting a divorce and that she was dating "a cop from Lee's Summit." Tina told Baker that she spent time with the police officer in her home and that she was having a relationship with him because "he was helping her to get a divorce from her husband, to get rid of him." Tina also informed Baker that Tina's relationship with the police officer was sexual. According to Baker, Tina spoke of her relationship with the police officer openly and was "sort of bragging" about it.

According to Huffman, Tina spoke with him about her pursuit of a criminal case against White for molesting her daughter. She told Huffman that she had a boyfriend named "Curt Cox." Tina told Huffman that "Curt" was a good influence on her children and was teaching her son how to fix motorcycles and helping her daughter with her homework. "Curt" was the code name that Tina and the children used to refer to McKinley. Huffman also noticed that Tina would wear an army jacket to work with the name "McKinley" on it.

White was tried three times in Missouri state courts for the alleged molestation of Jami. At his first trial, the jury convicted White of 12 counts of sexual molestation. Before his sentencing, White fled to Costa Rica where he was apprehended and eventually returned to Missouri.[8] "White learned after the verdict that Tina White and the chief investigator of the alleged crime [McKinley] had been engaged in a romantic relationship. White also learned that the prosecution knew about the relationship for approximately one year but failed to disclose the information to the defense." *State v. White*, 81 S.W.3d 561, 566 (Mo. Ct. App. 2002).

The Missouri Court of Appeals determined that evidence of the romantic relationship between Tina and McKinley during the investigation "was material impeachment evidence that the defense was denied by the suppression of this information." Id. at 570. The court also addressed McKinley's discovery of Jami's diary and his failure to seize it as evidence, stating that "one does not have to be in law enforcement to know that it would not be routine to review the diary and then return it to the complaining witness." *Id.* at 569-70. Because the State violated its duty to disclose evidence favorable to the defense, the court set aside White's conviction and remanded the case for a new trial.[9]

White filed the instant § 1983 action against McKinley and Tina, alleging that McKinley deprived him of procedural due process by not preserving the diary as evidence and not disclosing his romantic involvement with Tina. He also asserted a claim for conspiracy to violate § 1983 against McKinley and Tina, asserting that they conspired to deprive him of procedural due process.[10] Prior to trial, McKinley moved for summary judgment, claiming that he was entitled to qualified immunity. Tina also moved for summary judgment. The district court denied qualified immunity, and McKinley filed an interlocutory appeal with this court.

Because there were disputed issues of fact concerning McKinley's state of mind, we affirmed the district court's denial of summary judgment and remanded for trial. *White I*, 519 F.3d at 813-14.

At trial, the jury found in White's favor on both counts, assessing actual damages of $ 14 million and punitive damages against both McKinley and Tina of $ 1 million each. McKinley subsequently filed a motion for judgment as a matter of law, a motion for a new trial, and a motion to alter or amend the judgment. The district court denied all motions.

II. *Discussion*

On appeal, McKinley raises three arguments. First, he argues that the district court erroneously denied his motion for judgment as a matter of law because any violation of White's rights occurred because the prosecutor intentionally withheld the information from White. McKinley contends that he appropriately disclosed the potential impeachment evidence to the prosecutor. Second, he asserts that the district court should have granted his motion for a new trial because the court erroneously excluded substantial material evidence from the jury's consideration. Finally, he contends that the punitive damages award of $ 1 million is excessive and violates his due process rights because his net worth is only $ 31,000.

A. *Motion for Judgment as a Matter of Law*

First, McKinley argues that we should reverse the judgment because it imposes liability against a law enforcement official for failure to disclose potentially exculpatory impeachment evidence when the duty to disclose such evidence runs from law enforcement to the prosecutor. According to McKinley, he told the prosecutor that he had seen Tina on one or two occasions after his investigation into Tina's allegations against White concluded; in turn, the prosecutor, not McKinley, made the decision not to disclose such information to White on repeated occasions, including when McKinley was deposed for and testified at the first criminal trial.

n response, White contends that McKinley's appeal is an attempt, contrary to this court's prior ruling, to relitigate the liability issue. According to White, this court has already considered the prosecutor's nondisclosure of the relationship and found that McKinley would nonetheless be liable if he misrepresented the nature and length of the relationship. In the alternative, White asserts that even if McKinley could relitigate the liability issue, the evidence shows that McKinley lied to the prosecutor about matters that were fundamental to the prosecutor's assessment of the relationship because McKinley misrepresented the relationship as not beginning until after the charges against White had been filed and as being unknown to the children. White also notes that McKinley's argument fails because it ignores the jury's finding that he destroyed the diary and covered up other exculpatory evidence in the course of the conspiracy.

Here, McKinley is not challenging the sufficiency of the evidence; instead, he is arguing that, as a matter of law, he cannot be held liable because it was the prosecutor's failure to disclose the existence of the relationship between McKinley and Tina that violated White's civil rights. We review de novo a district court's denial of a motion for judgment as a matter of law, "viewing the evidence in the light most favorable to the verdict." *Hyundai Motor Fin. Co. v. McKay Motors I, LLC*, 574 F.3d 637, 640 (8th Cir. 2009).

We previously held that genuine issues of material fact existed regarding whether McKinley acted in bad faith in deliberately withholding from the prosecution the full extent of his romantic relationship with Tina and in failing to preserve Jami's diary--which did not corroborate the molestation allegations--thereby precluding summary judgment on the basis of qualified immunity. *White I*, 519 F.3d at 813-14. We then found that the facts, as alleged by White, satisfied the "bad faith standard." *Id.* at 814.

We agree with White that McKinley is essentially attempting to relitigate the issue of qualified immunity. In light of our prior holding, and viewing the facts in the light most favorable to the jury's verdict, a reasonable jury could have concluded that McKinley's misrepresentation of his relationship with Tina to the prosecutors and failure to preserve the diary was done in bad faith. As the district court correctly observed:

> Detective McKinley's argument that a police officer has no obligation to preserve exculpatory evidence if he tells the prosecutor about it is also contrary to the Eighth Circuit's opinion in this case. The Eighth Circuit held that a police officer is responsible if he withholds the evidence in bad faith. Furthermore, there is ample evidence that Detective McKinley did not truthfully tell the prosecutor about the evidence he now claims to have revealed.

White v. McKinley, No. 05-0203-CV-W-NKL, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *4 n.7 (W.D. Mo. March 26, 2009) (slip copy) ("*White II*").

Accordingly, we hold that the district court did not err in denying McKinley's motion for judgment as a matter of law.

B. *Motion for a New Trial*

Second, McKinley argues that the district court should have granted him a new trial because it erroneously excluded evidence of (1) White voluntarily fleeing to Costa Rica for nearly a year after his conviction but prior to sentencing; (2) the full extent of McKinley's investigation and what was provided to the prosecutors; and (3) the reasons for the prosecutors' conduct in repeatedly failing or refusing to disclose potentially exculpatory impeachment evidence and their conduct and reasons for stopping McKinley from revealing the evidence. According to McKinley, the district court's failure to permit such evidence prejudiced him when the jury was asked to determine whether he acted in bad faith.

In response, White asserts that the district court *did not* exclude most of the evidence that McKinley now claims was excluded. Moreover, White argues that the district court's exclusion of such evidence was well within its discretion. According to White, the district court admitted relevant evidence and excluded evidence that was not probative or was so marginally probative that it would not justify admission under Federal Rule of Evidence 403. And, White contends that McKinley identifies nothing that raises any substantial concern that the jury would have decided the case differently.

"We review a district court's denial of a motion for new trial with great deference, reversing only if the district court clearly abused its discretion." *Wilson v. City of Des Moines*, 442 F.3d 637, 640 (8th Cir. 2006). "When a motion for new trial is based on rulings regarding the admissibility of evidence, the district court will not be reversed absent a clear and prejudicial abuse of discretion." *Id.* at 640-41(internal quotations and citations omitted). Only if the excluded evidence "is of such a critical nature that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted has a district court so abused its discretion." *Id.* at 641 (internal quotations and citations omitted).

1. *White's Flight to Costa Rica*

McKinley maintains that the district court improperly restricted evidence of White's absconding to Costa Rica because it was relevant to causation and damages. According to McKinley, White asked the jury to find liability and award him damages based on evidence that he was wrongfully convicted and imprisoned and suffered for six years, deprived of his children, family, and income. McKinley asserts that the jury should have heard evidence that White fled the United States after his conviction but before he was sentenced. McKinley contends that such evidence was relevant to whether White proved that McKinley's failure to preserve the diary and failure to disclose the relationship caused White's incarceration. According to McKinley, such evidence was also relevant as to White's alleged damages. McKinley argues that the jury was given an incomplete and misleading account of White's suffering.

"Federal Rule of Evidence 403 . . . provides that . . . '[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *United States v. Keiser*, 578 F.3d 897, 904 (8th Cir. 2009) (quoting Fed. R. Evid. 403). Here, the district court excluded evidence of White's flight to Costa Rica and his Costa Rican incarceration and permitted only evidence of White's incarceration in the United States. This ruling was not an abuse of discretion, as the district court "considered the probative value versus the prejudicial impact of [White's] flight and Costa Rican prison conditions, as well as the collateral nature of evidence that White would not have been incarcerated absent the flight."

White II, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *13. The district court "found that it was speculation to say that White would not have been incarcerated in the United States absent his flight, *particularly in the absence of testimony by White's criminal trial judge, or comparable rulings in any Missouri court, or expert testimony.*" *Id.* (emphasis added). The district court noted that McKinley failed to offer any "actual evidence--expert or otherwise--that White, a convicted child molester, would have been released on bond pending his re-trial." *Id.* The district court's finding is buttressed by § 547.170 of the Missouri Revised Statutes, which prohibits bail during an appeal if the defendant was convicted of a sex crime involving a person under 17 years of age.[11] Here, White was convicted of just such an offense in his first trial.

As to the length of White's incarceration, the district court only "allowed evidence of White's incarceration in the United States." *White II*, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *13. The jury was also instructed that White was free until his sentencing in January 2000. Therefore, the only issue is the amount of time White was incarcerated from the date of his sentencing until his release.

During opening arguments, White's attorney stated that White was "going to tell you about what it was like to spend six years--" McKinley's counsel interrupted, objecting to that statement, and the district court sustained the objection. White's attorney then corrected himself, saying, "To spend over five years trying to learn how to survive in hell on earth." During direct examination, White's counsel asked White about "serv[ing] out [his] over five years." McKinley's counsel did not object. Thereafter, Kurt Krueger, an economist testifying on White's behalf, testified as to the calculations that he had prepared of White's lost earnings capacity in 2006. Based on Krueger's report, White would have been making $ 80,000 a year as an above-average insurance salesperson in 1999. When asked what that number would have been in 2006, Krueger replied that it would have been $ 106,000. White's counsel then stated, "Now, Mr. White was in prison from 1999 to 2005." At that point, McKinley's counsel interrupted and asked to approach the bench. McKinley's counsel explained that he had "a problem with this number from the standpoint that it concludes [sic] the year that [White] was gone. He was only in prison for five years. So these figures are, you know, obviously not correct." The district court advised McKinley's counsel that he could make that argument. On cross-examination, the following exchange occurred:

> Q. [By McKinley's Counsel]: And your figures would be a little different if, in fact, he was only in prison for five years.
>
> MR. McCALLISTER [White's counsel]: Your Honor, I object. Assumes facts not in evidence.
>
> THE COURT: Please approach.
>
> (Counsel approached the bench and the following proceedings were had:)
>
> THE COURT: I've been wondering about this.
>
> MR. McCALLISTER: This assumes facts not in evidence

THE COURT: Are you asking the jury to return economic losses while he was, in fact, not in the United States?

MR. McCALLISTER: No. That's why we calculated starting January of 2000, and Mr. Ensz [McKinley's counsel] knows that. And we had a discussion about that last night before today's proceedings.

THE COURT: Mr. Ensz, shame on you.

MR. ENSZ [McKinley's counsel]: Well, I'm looking--I mean, this is the figure I'm looking at. And he's got a 1999—

THE COURT: Did Mr. McCallister tell you that last night?

MR. ENSZ: He told me he was going to give me new calculations.

THE COURT: He just made a statement. Did he tell you that, or did he not? Answer the question asked you.

MR. ENSZ: I don't think he told me that last night.

MR. McCALLISTER: I put two charts on his chair this very morning that start with the year 2000 that I showed the jury on the Elmo.

THE COURT: *Are you representing to the court that none of your figures are taking into account the time that he was out of the country*

MR. McCALLISTER: *That's correct.*

THE COURT: Do you have evidence to show otherwise, Mr. Ensz? You don't need to do it now.

MR. ENSZ: It shows 1999, that's all I'm saying. Maybe he gave me something else and I didn't see it.

THE COURT: We'll talk about that issue later. But as to your objection, I will sustain it.

MR. McCALLISTER: Your Honor, also, I would ask that the jury be instructed not to--to disregard his comment about that.

THE COURT: His last statement.

(The following proceedings were had in open court:)

THE COURT: I'll instruct the jury to disregard the last statement by Mr. Ensz. Any further questions?

MR. ENSZ: I have no further questions.

(Emphasis added.)

During closing argument, White's counsel stated that

> Matt O'Connor, a friend of [White's], an attorney that believed in him and wanted to help him, sat across the table from that man. That man swore to tell the truth, looked him in the eye, and lied to him. *And then he has to spend five and a half years* feeling that he let his friend down, sent him off to hell in a maximum security prison."

(Emphasis added.) White's counsel also stated that White "spent five and a half years in prison." He then suggested a number to the jury of "$ 3 million a year for five and a half years in prison." Finally, he stated, "Well, if you find, again, that he shouldn't have been in prison and he is entitled to money, then I've given you a figure of five hundred and--he was there five and a half years. That's $ 550,000, plus this figure of $ 56,849.97."

Viewing the transcript in the totality, we conclude that the jury was properly instructed that White only spent five-and-a-half years in prison pending appeal--the time in which he was incarcerated in the United States.

Therefore, we hold that the district court did not abuse its discretion in excluding evidence of White's flight to Costa Rica.

2. *Prosecutor's Conduct During McKinley's Deposition*

McKinley next contends that the district court erroneously excluded evidence regarding the prosecutor's conduct during McKinley's deposition and her subsequent conversation with McKinley regarding whether any of the questions asked called for disclosure of McKinley's relationship with Tina. According to McKinley, the district court erroneously prohibited the jury from hearing the prosecutor's testimony that McKinley was worried before and after the deposition about whether the questions called for disclosure of the relationship and whether she thought that his answers were appropriate.

As the district court correctly observed "Detective McKinley testified at length concerning his deposition testimony; he testified that it was truthful and offered an explanation for how it could be interpreted as such; his lawyer argued his explanation in closing." *White II*, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *15 (citing Tr. at 576-89, 1677-86, 1692-94, 1784-85, 2035-36). McKinley also testified that Prosecutor Mettler and he discussed whether he should disclose the relationship during the deposition and that he told her that he wanted to disclose the relationship. In turn, Prosecutor Mettler testified regarding her recollection of meeting with McKinley to prepare him for the deposition. When asked by McKinley's counsel why McKinley wanted to disclose his relationship with Tina, Prosecutor Mettler responded, "I don't recall him saying that he necessarily wanted to provide the information. I recall him being perfectly willing to provide it, not having any qualms whatsoever about providing the information. That's what I recall. I don't recall him asking to provide it."

The district court, however, did prohibit testimony regarding Prosecutor Mettler's *reaction* to the answers that McKinley gave during the deposition. The court prohibited Prosecutor Mettler from testifying as to "anything she said or did during the course of the deposition." The court "permit[ted] testimony that she was there at his deposition, but [it] [would] not permit anything beyond that point." In explaining its ruling, the district court stated:

> Nothing, nothing about after the deposition. And here is why, Mr. Ensz. I agree there is some small modicum of relevancy to that on his issue of good faith, but it is far outweighed by the fact that that will invade the province of the jury in deciding whether the question called for a particular answer. She is not appropriately the one to make that decision. It is a decision for the jury. So it will not be permitted in.

We hold that the district court did not abuse its discretion in prohibiting McKinley from eliciting testimony from Prosecutor Mettler as to whether McKinley had testified correctly during his deposition, as the jury heard McKinley's own testimony that he believed that he had testified correctly. Prosecutor Mettler's bolstering of such testimony would have added nothing consequential to the record.

3. *Full Extent of McKinley's Investigation/Prosecutors' Testimony as to Why They Charged White*

McKinley also asserts that the district court erroneously excluded testimony from the prosecutors involved in bringing the original charges against White and pursuing the three criminal trials. According to McKinley, the district court should have permitted the prosecutors to recount the evidence they reviewed before deciding to pursue the criminal trials. Additionally, he argues that the district court erroneously excluded evidence of his own investigation, which was relevant to causation. McKinley maintains that he was limited to trying to defend himself against the accusations that he acted in bad faith by failing to preserve the diary and in failing to disclose the true nature and extent of his relationship with Tina.

In denying McKinley's motion for a new trial, the district court addressed McKinley's assertion that the court should have permitted him to introduce evidence of the entirety of the investigation to demonstrate the thoroughness and quality of the investigation, stating:

> White may have been guilty and Detective McKinley may have conducted an otherwise acceptable investigation, but if he deliberately suppressed or failed to preserve specific evidence in bad faith, he violated White's right to a fair trial. The fact that Detective McKinley thoroughly investigated Jami's complaint does not indicate that he had a good faith reason for not securing the diary or failing to reveal to the prosecutor his true relationship with Tina. Evidence that Detective McKinley revealed other exculpatory proof would logically show that his omission as to the diary, relationship and PCP exam was unintentional; but doing a good job to find evidence that tended to prove White's guilt does not. Indeed, showing that he conducted a thorough investigation, except for leaving the diary with the complaining witness, failing to document pre-CPC interview and making misleading statements about his relationship with Tina, would tend to show he was acting in bad faith, not good faith; i.e., he knew how to conduct a thorough exam but chose not to when it came to exculpatory evidence.

> Finally, the inflammatory and collateral nature of the investigation evidence--which was, in essence, evidence of White's guilt--would have far outweighed any probative value in showing that Detective McKinley's investigation was thorough.

White II, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *15-16 (footnote omitted).

We hold that the district court did not abuse its discretion in prohibiting such evidence, as admittance of the evidence would have created a mini-trial on White's actual guilt, which is not the subject of a § 1983 action. Rather, the question for the jury was whether White received a fair trial. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), does not require the plaintiff to show that the jury in his criminal trial would have acquitted him or that he was innocent. "'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

And, the district court also addressed its decision to prohibit the prosecutors involved in White's criminal trials from testifying about the evidence on which they relied, their follow-up investigations, and their positions with regard to disclosing the relationship between McKinley and Tina, stating:

> Though Detective McKinley's argument implies that the Court did not allow any evidence of the prosecution, the Court did allow Detective McKinley to introduce prosecutorial evidence which was probative of the issues in this, as opposed to the criminal case. Furthermore, even if the excluded evidence had come in, the Court does not believe it would have changed the outcome of the case. The prosecutors did not know all the evidence submitted in the civil case and Detective McKinley's and Tina's testimony was sufficiently unbelievable that a jury would have found bad faith even if the prosecutors had been allowed to testify about their belief that the evidence was not exculpatory, particularly in light of the Missouri Court of Appeals opinion.

White II, 2009 U.S. Dist. LEXIS 24556, 2009 WL 813001, at *18.

We find no abuse of discretion in the district court's decision to exclude the prosecutors' testimony about the evidence upon which they relied in prosecuting White. Again, the issue is not whether White is actually guilty or innocent, but whether McKinley violated White's civil rights. *See Whitehill*, 532 F.3d at 753.

C. *Punitive Damage Award*

Third, McKinley argues that the punitive damages award of $ 1 million is excessive and violates his due process rights in light of his net worth of only $ 31,000 In his reply brief, McKinley concedes that he did not raise the issue before the district court but argues that this court should grant plain error relief because the error in the award is plain, his rights are substantially affected, and the award represents a miscarriage of justice.

Because McKinley failed to challenge the punitive damages award in his post-trial motion, we review for plain error. "Under plain error review, the defendant must show: (1) an error; (2) that is plain; and (3) that affects substantial rights." *United States v. Williams*, 590 F.3d 616, 619 (8th Cir. 2010) (internal quotations and citations omitted).

Regarding punitive damages, "the most important factors to consider in a due process analysis include 'the degree of reprehensibility of the defendant's conduct' and the 'ratio [of punitive damages] to the actual harm inflicted on the plaintiff.'" *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362 (8th Cir. 2009) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 580, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)). "A high ratio may be appropriate based on particularly reprehensible conduct or where actual damages are nominal." *Id.* But "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* (internal quotations, alteration, and citation omitted). "In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such [as] an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand." *Id.* at 362-63 (internal quotations and citation omitted).

Here, the jury awarded White $ 14 million in actual damages, while the punitive damages award was $ 1 million. The punitive damages award amounted to approximately seven percent of the actual damages. Therefore, we see no plain error in the punitive damages award.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

Footnotes

1The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, sitting by designation.

2Tina also moved for summary judgment on all counts.

3The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

4The district court denied Tina's motion as to the (1) § 1983 conspiracy claim, (2) false arrest claim, and (3) malicious prosecution claim.

5Tina did not appeal the adverse judgment.

6McKinley admitted at trial that he had a side business painting houses.

7McKinley maintained, contrary to Jami's testimony, that he did not conduct a pre-CPC interview of Jami. But he admitted that if he had conducted a pre-CPC interview, he should have reported it to the prosecutor.

8Because White fled the jurisdiction prior tc sentencing, Missouri's escape rule presumably applied. This rule precludes any appeal when a defendant has fled the jurisdiction after conviction but before sentencing. But the Missouri Court of Appeals waived the rule and permitted White to appeal his conviction because of evidence that was uncovered after his conviction.

9White's second trial resulted in a hung jury--11 jurors in favor of acquittal and one in favor of conviction. At his third criminal trial, in January or February 2005, White was acquitted. Having remained incarcerated post-appeal and throughout the second and third trials, White was released from custody in February 2005.

10White also filed claims based on other constitutional torts and various common law torts, and the district court granted summary judgment in favor of McKinley and Tina on the constitutional claims. White eventually dismissed the common law claims. The City of Lee's Summit, McKinley's employer, settled with White early in the litigation.

11Section 547.170 of the Missouri Revised Statutes provides:

> In all cases where an appeal or writ of error is prosecuted from a judgment in a criminal cause, *except* where the defendant is under sentence of death or imprisonment in the penitentiary for life, . . . or where the defendant has entered a plea of guilty to or been found guilty of any sexual offense under chapter 566, RSMo, where the victim was less than seventeen years of age

> at the time the crime was committed, any sexual offense under chapter 568, RSMo, where the victim was less than seventeen years of age at the time the crime was committed, or any pornographic offense involving a minor as set forth in sections 573.023, 573.025, 573.035, 573.037, and 573.040, RSMo, any court or officer authorized to order a stay of proceedings under the preceding provisions may allow a writ of habeas corpus, to bring up the defendant, and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge.

(Emphasis added.)

Case No. 05-0203-CV-W-NKL

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

THEODORE W. WHITE, Plaintiff,

v.

RICHARD McKINLEY, et al, Defendants.

March 26, 2009, Decided

March 26, 2009, Filed

NANETTE K. LAUGHREY, United States District Judge.

ORDER

Before the Court are Defendant Richard McKinley's Motion for Judgment as a Matter of Law after Trial [Doc. # 367] ("JMOL"), and Motion for New Trial and Alternative Motion to Alter or Amend Judgment [Doc. # 369]. [1] For the following reasons, the Court denies the motions.

I. Background

A. Procedural History

Plaintiff Theodore W. White ("White") was tried three times in Missouri state courts for the alleged molestation of his adopted daughter, Jami. The allegations of abuse were made by Jami while a dissolution of marriage action was pending between White and his wife, Tina, [2] who was Jami's biological parent. At his first trial, White was convicted of twelve counts of sexual molestation. Before he was sentenced, he fled to Costa Rica where he was apprehended and eventually returned to Missouri.

Because White fled the jurisdiction pending sentencing, Missouri's escape rule [3] would normally apply. However, the Missouri Court of Appeals waived the rule and permitted him to appeal his conviction because of evidence which was uncovered after his conviction. "White learned after the verdict that Tina White and the chief investigator of the alleged crime, [Detective McKinley,] had been engaged in a romantic relationship . . . and the prosecutor knew about the relationship for approximately one year but failed to disclose the information to the defense." *State v. White*, 81 S.W. 3d 561, 566 (Mo. Ct. App. 2002). The Missouri Court of Appeals concluded that evidence of the romantic relationship between Tina and Detective McKinley during the investigation "was material impeachment evidence that the defense was denied by the suppression of the information." *Id.* at 570. The Missouri court also addressed Jami's diary that had been found by Detective McKinley during his investigation, but which he did not seize as evidence. The Missouri court stated that "one does not have to be in law enforcement to know that it would not be routine to review the diary and then return it to the complaining witness." *Id.* at 569-70. Because the State violated its duty to disclose evidence favorable to the defense, the Missouri Court of Appeals set aside White's conviction and remanded the case for a new trial

White's second trial on the molestation charges resulted in a hung jury, eleven for acquittal and one for conviction. At his third criminal trial, in January and February 2005, White was acquitted. Having remained incarcerated post-appeal and throughout the second and third trials, White was released from custody in February 2005.

On March 4, 2005, White filed this § 1983 action against Detective McKinley and Tina, alleging that Detective McKinley deprived him of procedural due process in part by failing to preserve the diary as evidence and failing to disclose his romantic involvement with Tina. White also asserted a claim for conspiracy to violate § 1983 against Detective McKinley and Tina, alleging that they conspired together to deprive him of procedural due process. [4] Shortly before trial, Detective McKinley filed a motion for summary judgment claiming that he was entitled to qualified immunity. Tina also sought summary judgment. After the Court denied Detective McKinley's request for qualified immunity on the 1983 and conspiracy claims, Tina and Detective McKinley took an immediate interlocutory appeal.

The United States Court of Appeals for the Eighth Circuit considered Tina and Detective McKinley's interlocutory appeal in *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008). In that case, the Eighth Circuit expressly held that

> [t]he right *Brady* describes definitely applies to prosecutors and imposes upon them an absolute disclosure duty. But, *Brady's* protections also extend to actions of other law enforcement

officers such as investigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir.2004). "[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial." *Id.* Consequently, to be viable, White's claim must allege bad faith to implicate a clearly established right under *Brady*.

Upon review, we agree with the district court that the facts alleged here meet the bad faith standard. Treating the facts as alleged to be true, a reasonable juror could find Richard deprived White of a fair trial in bad faith by deliberately steering the investigation to benefit his love interest, Tina. Richard deliberately withheld from prosecutors the full extent of his relationship with Tina and failed to preserve the alleged victim's diary which did not corroborate the molestation allegations. Failing to preserve the diary deprived White of his right to a fair trial, in part, because he could not testify about the diary without waiving his right not to testify. Whether Richard's failure to disclose the full extent of his relationship with Tina and preserve the diary were done in bad faith are disputed factual questions inappropriate for summary judgment.

White v. McKinley, 519 F.3d 806, 813-14 (8th Cir. 2008). With regard to the diary and his relationship to Tina, the Eighth Circuit stated: "We hold that no reasonable police officer in Richard's shoes could have believed that he could deliberately misrepresent the nature and length of his relationship with Tina, or that he could deliberately fail to preserve a child victim's diary containing potentially exculpatory information." *Id.* at 814. Because there were disputed issues of fact concerning Detective McKinley's state of mind, the Court of Appeals affirmed the District Court's denial of summary judgment and remanded for trial.

B. Federal Trial Evidence

After the case was returned to the District Court, a jury trial was held on White's claim that Detective McKinley and Tina denied him his right to a fair trial. The evidence at that trial, viewed in the light most favorable to the verdict, [5] showed that Ted White moved into Tina's home shortly after they met. At the time, Tina had custody of her two children by a prior marriage, Jami and Danny. White eventually agreed to adopt Jami and Danny but their biological father would not agree to terminate his parental rights. In 1995, he changed his mind and permitted White to adopt both children. Sometime thereafter an acquaintance asked Tina why the children's biological father finally agreed to give up his rights. Tina said she threatened to charge him with child molestation if he didn't cooperate. White adopted Tina's children in January 1996.

Throughout their marriage Tina and White spent a lot of money which became a serious problem when White had to change jobs. In the fall of 1997, the parties were openly in conflict and Tina and the children gathered White's belongings while he was gone and put them in the garage, locking White out of he house. When White got home, he broke down the door and went to bed. Sometime thereafter, the White's housekeeper, Nina Morerod observed Detective McKinley at the house preparing an estimate for repair of the broken door frame. Tina had told Ms. Morerod that someone was coming to repair the door. Detective McKinley admitted at trial that he had a side business doing home repairs. White and Tina eventually separated around Halloween after a dispute about a mortgage check which Tina cashed, keeping fifty percent of the proceeds. During this separation Tina filed for divorce.

White and Tina eventually reunited and White returned to the family home, but unbeknownst to White, Tina did not dismiss the divorce petition. Thereafter, Tina told White that during their separation she had kissed a Lee's Summit fireman that she met at a bar. The fireman liked motorcycles. Later evidence established that Detective McKinley rode a motorcycle and was a Lee's Summit policeman. Tina also told a co-worker, Claudia Baker, that she had a cop boyfriend who was helping Tina get rid of Tina's husband.

After White and Tina reunited, they continued to have disputes about money. In February 1998, White put Tina on a budget and had the locks changed at his business. On March 21, 1998, Jami first made allegations of sexual abuse. At the time, she was twelve years old. After Jami made sexual abuse allegations against White, Detective McKinley was assigned to be the lead investigator which was the role he usually took in sexual abuse investigations for the Lee's Summit Police Department. During that investigation, Detective McKinley found Jami's diary. The diary described White as a good father with whom Jami wanted to spend more time and Tina as unloving. In the diary Jami said she wanted to be closer to her mother. As part of his investigation Detective McKinley took pictures of Jami's room, her hobby horse, mirrors and door frames, yet he did not seize the diary. The diary later disappeared and neither Jami nor Tina can say what happened to it. [6]

Detective McKinley did at least two other things that aren't normally done during an investigation of a complaint involving sexual abuse of a child. Detective McKinley declined White's attorney's offer to have White give a statement. More importantly, Detective McKinley interviewed Jami before her CPC exam with Child Protective Services. Law enforcement officials do not interview victims about the details of a sexual molestation charge before a trained professional can conduct the CPC exam. This is done to ensure that the memories of the child are not contaminated by leading questions or suggestive statements by law enforcement.

Before the first trial, the prosecutors learned that Tina and Detective McKinley had a relationship but both Tina and Detective McKinley lied to the prosecutors about the extent of the relationship. They told the prosecutors that their relationship did not begin until after Detective McKinley's investigation was completed. The prosecutors were also told that Detective McKinley was not involved with the children before the first trial. Had the prosecutors known that the relationship was ongoing during the investigation, they would have revealed it to the defense.

The verdict-directing jury instructions on White's § 1983 and conspiracy claims are attached. [*See also* Doc. # 348, Jury Instructions.] In sum, the jury was instructed that it must render a verdict against Detective McKinley if it found: (1) that Detective McKinley failed to disclose, or failed to preserve, evidence material to White's criminal-trial defense; (2) that Detective McKinley did so in bad faith; and (3) that this conduct injured White. [Doc. # 348, Instr. 15.] The jury was further instructed, "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the accused, the result of the proceeding would have been different." *Id.* The jury found in favor of White on both counts, assessing actual damages in the amount of $ 14 million and punitive damages against both Detective McKinley and Tina in the amount of $ 1 million each.

II. Discussion

A. Motion for Judgment as a Matter of Law after Trial[7]

On a motion for judgment as a matter of law, the Court must give "great deference to the jury's verdict." *Heaton v. The Weitz Co., Inc.*, 534 F.3d 882, 889 (8th Cir. 2008) (citation omitted). To survive a motion for judgment as a matter of law, the nonmoving party must present more than a scintilla of evidence. *Gill v. Maciejewski*, No. 07-3451, 546 F.3d 557, 2008 WL 4777127 (8th Cir. 2008). The nonmoving party receives the benefit of all inferences which can be drawn without resort to speculation. *Marvin Lumber & Cedar Co. v PPG Indus., Inc.*, 401 F.3d 901, 908-09 (8th Cir. 2005). Indeed, the court must

> consider the evidence in the light most favorable to the jury verdict. Specifically, we assume all conflicts in the evidence were resolved in [Plaintiffs'] favor, assume [Plaintiffs] proved all facts that [their] evidence tended to prove, and give [Plaintiffs] the benefit of all favorable inferences that reasonably may be drawn from the proven facts.

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001, 1009 (8th Cir. 2008) (citations omitted)

1. Exculpatory Evidence

In the face of overwhelming evidence, Detective McKinley argues that the jury's verdict on White's § 1983 claim was without evidentiary support. The Court considers Detective McKinley's arguments concerning each piece of evidence in turn, while recognizing that it was within the province of the jury to find that the collective absence of exculpatory evidence in White's first trial created a reasonable probability that the outcome of that trial would have been different had the exculpatory evidence been available. *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996) (considering whether a criminal defendant had stated a *Brady* claim).

1. Relationship Between Tina and Detective McKinley

Detective McKinley argues that his relationship with Tina did not violate White's right to a fair trial because he disclosed the existence of the relationship to the prosecutor. In response, White asserts that Detective McKinley failed to disclose the full nature and extent of the relationship. Specifically, Detective McKinley lied to the prosecutors about: (1) when the relationship began; (2) his involvement with Tina's children prior to the first trial; and (3) Detective McKinley and Tina's intent to deprive White of a fair trial.

(1) Timing of the relationship

It is undisputed that Detective McKinley told prosecutors that his relationship with Tina began after he completed his investigation. However, there was evidence from which a reasonable juror could conclude that the relationship began before the abuse allegations were even made. Nina Morerod testified that she saw Detective McKinley at the White's residence prior to the abuse allegations, and he was measuring a door for repair. Ms. Morerod also said that Tina told her that someone was coming to look at the door and Detective McKinley admitted that he had a part time home repair business. While Detective McKinley disputes Ms. Morerod's credibility, his lawyer extensively cross-examined her about her prior statements and otherwise challenged her credibility. Unless Ms. Morerod's testimony was so incredible or impossible that no reasonable juror could believe it, it was up to the jury to weigh her credibility. *See United States v. Mitchell*, 528 F.3d 1034, 1041 (8th Cir. 2008) (citations omitted)

("[A]ttacks on the sufficiency of the evidence based on the witnesses' credibility are rarely an appropriate ground for reversal. We would reject the evidence only if it asserted facts straying into the realm of impossibility"). No one could fairly conclude that Ms. Morerod's testimony at trial was incredible as a matter of law. She was emphatic that she saw Detective McKinley come to the house to measure the damaged door and she previously testified to the same thing when she saw Detective McKinley at White's criminal trial. It was up to the jury to determine whether Ms. Moreod was credible.

Further, there was other evidence from which the jury could infer that a relationship existed prior to the molestation allegations. According to Tina, in early March 1998, White checked messages at the White residence and heard a message from Jami warning Tina to "get rid of the guys before [White] comes home." Although Tina testified that Jami had been joking, Tina also testified that Jami did not usually joke about Tina being unfaithful to White.

In addition, White testified to a statement made by Tina indicating that she was involved in a relationship prior to the allegations. White testified that, in the fall of 1997, Tina told him she had kissed a fireman from Lee's Summit who had a motorcycle. Detective McKinley argues that it is speculation to infer that this statement referred to Detective McKinley, a Lee's Summit police officer who had a motorcycle. However, Detective McKinley's lawyers cross-examined White about this statement (Tr. 404), Tina denied that she made the statement about the firefighter (Tr. 1300-1302), and Detective McKinley's lawyers argued the weight of the evidence concerning the statement (Tr. 2043). [8] While the statement standing alone might not establish that Tina was seeing Detective McKinley before the allegations of abuse, in conjunction with the testimony of Nina Morerod, the jury could reasonably infer that the statement was referring to Detective McKinley and Tina slightly altered the facts to avoid identifying the person she actually kissed. It was for the jury to weigh this evidence and from it could logically infer that Tina's relationship with White existed before the allegations of sexual abuse.

Finally, even if the jury found that the relationship began during the investigation and not before it, the jury could still have found that a constitutional violation occurred A reasonable juror could conclude that Tina and Detective McKinley violated White's right to a fair trial when they told prosecutors that the relationship did not start until after the investigation was completed and that it only involved going out for a drink. At the time these statements were made, Detective McKinley had already acknowledged that the relationship was sexual and had been told by the Chief of Police to end the relationship, a warning that Detective McKinley did not heed or report to the prosecutors. Given these facts the jury might disbelieve Detective McKinley and Tina when they testified that the relationship began after the investigation was completed. Indeed, a review of Tina's and Detective McKinley's testimony at trial reveals so many statements that appear to be untrue, that a reasonable juror could not only discount Tina's and Detective McKinley's statements about when the relationship started, but conclude that their efforts to cover up the truth about the relationship was evidence of bad faith.

(2) Detective McKinley's Interaction with Children

There was also evidence that Detective McKinley told the prosecutors that he had no personal involvement with Jami and Danny before trial. Prosecutor Mettler testified that Detective McKinley and Tina advised Prosecutor Mettler that the children had no idea that Tina was having a relationship with Detective McKinley. Prosecutor Mettler testified that they told her they used a code name - Curt - in speaking of Detective McKinley so that the children would not know the identity of the man Tina was dating.

However, Tina and Detective McKinley never advised Prosecutor Mettler that Detective McKinley was coming to the White residence, helping Jami with her homework, or helping Tina's son work on motorcycles prior to the first trial. Yet Tina's former coworker testified that, before the first trial, Tina said her boyfriend, Curt Cox, was having a positive influence on her children, as he was helping the children with their homework and working on motorcycles with her son. The jury could reasonably infer that Tina was talking about Detective McKinley when she told the co-worker that her boyfriend was interacting with her children. Jami also testified that she had sent a letter to a friend before the trial telling her that she had gone to "Curt's" house and picked out her room. The jury could conclude that Jami was talking about Detective McKinley, particularly because Detective McKinley and Tina moved in together shortly after the trial.

From this evidence, the jury could infer that Detective McKinley misrepresented the full nature and extent of his relationship with Tina to the prosecutors who could not, therefore, disclose the full nature and extent of the relationship to White for use in his defense. A prosecutor testified that had she known the extent of the full relationship between Detective McKinley and White's children before trial, she would have told White about it.

(3) Intent to Deprive White of Fair Trial

Further, there was evidence that Tina and Detective McKinley were plotting against White. Another former co-worker of Tina's testified that, before the first trial, Tina spoke of her boyfriend helping her to get rid of her husband; Tina told the co-worker that the boyfriend was a Lee's Summit police officer. Detective McKinley certainly did not disclose such a plot to the prosecutors so that White could use the information in his defense.

While Detective McKinley argues the weight of the evidence presented to the jury, the measure here is whether there was sufficient evidence from which a jury could determine - without resort to speculation - that Detective McKinley misrepresented to the prosecutors the full nature and extent of his relationship with Tina and her children, and whether that interfered with the prosecutor's ability to appropriately determine whether to disclose the relationship to White. The record shows unequivocally that that evidentiary standard has been met.

b. Diary

Detective McKinley argues that his conduct with regard to Jami's diary did not violate White's right to a fair trial for two reasons. First, he argues the diary was not exculpatory; but as the Missouri Court of Appeals, the Eighth Circuit and the trial evidence clarified, the diary was exculpatory. Second, he takes the position that he cannot be held liable because he disclosed the existence of the diary to the prosecutor and he didn't destroy the diary; but under the Eighth Circuit's holding, Detective McKinley is liable for failing to preserve the diary because the trial evidence showed he did so in bad faith.

(1) Exculpatory Nature of Diary

First, Detective McKinley argues that the diary was not exculpatory on its face and, therefore, could not have been the basis for a finding of liability. While there was no evidence that the diary spoke directly to the allegations of molestation, there was evidence that the diary contradicted those allegations. White testified that he had seen the diary, that it said he was a good father, that it said Jami wanted to spend more time with him, and that it said that Jami wanted more attention from her mother. Such statements could be used for impeachment because Jami may have had a motive to fabricate the abuse allegations to gain her mother's attention or to please her mother. They also suggest a positive relationship with her father. This is confirmed by the Missouri Court of Appeals which held that the diary was exculpatory because it could be used for impeachment purposes. In addition, the Eighth Circuit said that "[f]ailing to preserve the diary deprived White of his right to a fair trial, in part, because he could not testify about the diary without waiving his right to testify." *White v. McKinley*, 519 F.3d 806, 814. In addition, the Eighth Circuit and Supreme Court have held that a due process violation occurs when a police officer suppresses in bad faith "potentially" exculpatory evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008); *Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004). This standard recognizes the difficulty of establishing the exculpatory nature of evidence which has been suppressed in bad faith and is no longer available.

The jury also heard that, after the diary's disappearance was revealed to a criminal jury, White was acquitted. This could be considered as evidence that the unpreserved diary was exculpatory. *See Malone v. Walls*, 538 F.3d 744, 760 (7th Cir. 2008) (considering the acquittal of a defendant whose trial included exculpatory testimony as indicative that conviction of a co-defendant would not have occurred had the exculpatory testimony been included in his trial). Indeed, there was so much evidence that the diary was exculpatory that Detective McKinley's argument to the contrary is frivolous.

(2) Disclosure of Diary's Existence to Prosecutor

Next, Detective McKinley argues that he cannot be liable because he mentioned the existence of the diary in a report produced to the prosecutor. He seems to argue that it is okay to not preserve evidence even when done in bad faith, if he tells the prosecutor about the existence of the evidence. Again, this argument is inconsistent with the Eighth Circuit's opinion in this case. The absence of the diary prevented its use for impeachment purposes and that problem was not solved by Detective McKinley telling the prosecutors about the diary. It was the absence of the diary that impaired White's due process rights not his failure to disclose its existence. Thus, the proper inquiry is whether Detective McKinley failed to preserve the diary and did so in bad faith.

It is undisputed that Detective McKinley did not preserve the diary even though he took exhaustive photos of Jami's room, her hobby horse, mirrors and door frames. A police practices expert testified that, under normal police practices, there would have been "no question or hesitation about collecting [the diary] as potential evidence." (Tr. 1920-22.) The Missouri Court of Appeals said that "one does not have to be in law enforcement to know that it would not be routine to review the diary and then return it to the complaining witness." *State v. White*, 81 S.W.3d 561, 569-70. Even Detective McKinley testified that, in a sexual abuse case, it is "obvious" that a diary should be taken into custody. Jami testified that Detective McKinley took some time to read the diary, and that she did not recall seeing it again after Detective McKinley had his hands on it. Detective McKinley concedes it disappeared but claims he left it at the White house. The jury was not required to find that a report mentioning the diary negates the possibility that Detective McKinley failed to preserve the diary in bad faith.

As to Detective McKinley's argument that there had to be evidence that he destroyed the diary, neither the Missouri Court of Appeals or the Eighth Circuit held this was necessary for a Brady violation to have occurred. This is particularly so given that the exculpatory evidence, even according to Detective McKinley, was left in the home of the complaining witness. *See State v. White*, 81 S.W.3d 567, 569-70 (2006).

c. Pre-CPC Interview [9]

Detective McKinley argues that the pre-CPC interview cannot form the basis of White's § 1983 claim because neither this Court nor the Eighth Circuit specifically considered it when Detective McKinley's Motion for Summary Judgment was ruled. While the Eighth Circuit expressly addressed Detective McKinley's relationship with Tina and the diary, its ruling in no way dictated that those two items were the only potential bases for White's claim that Detective McKinley suppressed and failed to preserve evidence. The Eighth Circuit stated, "[A] reasonable juror could find Richard deprived White of a fair trial in bad faith by deliberately steering the investigation to benefit [Richard's] love interest, Tina." *White*, 519 F.3d at 814. Thus, other evidence that Detective McKinley suppressed evidence to benefit his love interest with Tina is also properly considered. *See Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs.*, 364 F.3d 925, 931 (8th Cir. 2004) (stating that the district court is free to decide any issue not disposed of on appeal).

White introduced evidence that Detective McKinley met with Jami prior to her CPC interview. In the transcript of her CPC interview, Jami stated that, before the CPC interview, a "detective" spoke to her about the molestation allegations. Detective McKinley testified that he was the only detective who had been assigned to the case at the time of the CPC interview.

Even Detective McKinley does not argue that there is insufficient evidence that this meeting occurred.

There is also evidence that a pre-CPC interview by law enforcement would have been improper. Detective McKinley admitted that he knew such a meeting would be seriously improper; he admitted that the CPC used trained interviewers and recordings because children are susceptible to leading which can produce inaccurate testimony. Prosecutor Kanatzar testified that she would expect an officer to document any contact with an accuser in a police report. The police practices expert confirmed both Detective McKinley and Prosecutor Kanatzar's testimony in this regard. (Tr. 1916-1920.) The record shows that Detective McKinley never disclosed the pre-CPC interview to prosecutors. Detective McKinley simply denied that the interview occurred. The pre-CPC interview would be evidence favorable to White's defense and a jury could find that it was material, particularly in light of Detective McKinley's relationship with Tina and the fact that children are easily led if interviewed before an expert can do an evaluation. *See generally United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (holding that exculpatory evidence includes impeachment evidence).

It was for the jury to make a determination about the weight of the pre-CPC interview evidence and the credibility of the witnesses who testified about that meeting. As for the issue of qualified immunity, Detective McKinley is correct that there is no case which says that a police officer should not knowingly violate department policy and police practices by interviewing an alleged victim of sexual abuse and then in bad faith fail to disclose that interview to the prosecutor. On the other hand, in *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008), the Eighth Circuit held that White could recover if a reasonable juror "could find that Richard deprived White of a fair trial in bad faith by deliberately steering the investigation to benefit his love interest." *Id.* at 814. It specifically noted that there did not have to be a case on point since no reasonable officer could conclude that he could deliberately withhold potentially exculpatory evidence from a prosecutor in bad faith. Because the evidence of the pre-CPC interview is exculpatory, and a reasonable juror could conclude it was deliberately not disclosed to the prosecutor in bad faith, Detective McKinley does not have qualified immunity on this issue.

2. Bad Faith Generally

Detective McKinley argues that there was insufficient evidence of bad faith to submit the issue to the jury. He argues the evidence of bad faith as to each individual item of potentially exculpatory evidence -- the relationship, the diary, and the pre-CPC Interview -- suggesting that the jury was required to consider his intent as to each item by considering only evidence pertaining to that item.

However, the jury was entitled to consider the totality of the evidence in determining whether Detective McKinley was acting in bad faith when he deprived White of a fair trial, and there was significant evidence of bad faith. As to each item, there was evidence that Detective McKinley violated generally accepted practices or his department's express policy. *Cf. Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004) (finding no evidence of bad faith where investigators sent lab reports to the prosecutor in compliance with agency policy). There was also evidence that Detective McKinley purposefully avoided interviewing White contrary to generally accepted practices. The jury could reasonably infer improper motive where an experienced police detective consistently violated accepted practices and policy in one particular case, especially in light of his motivation for steering the investigation.

There was also other evidence of bad faith. There was evidence indicating that Detective McKinley, in an attempt to embarrass White, insisted on arresting White rather than allowing surrender. There was Tina's admission that her police-officer boyfriend was helping her to get rid of her husband and the lack of any reasonable explanation for photographing in detail the interior of the White's house but failing to seize the diary. The jury, listening to Tina and Detective McKinley's testimony, could believe that they were not telling the truth at trial and that there was a financial and personal motivation for steering the investigation so White would be convicted. The jury could reasonably infer that Detective McKinley was purposely trying to hide evidence favorable to White.

3. Conspiracy

Detective McKinley argues that no reasonable jury could find that he conspired with Tina to deprive White of a fair trial. The Court disagrees. The jury was instructed that, in order to find a conspiracy, it had to find that:

(1) Detective McKinley and Tina reached an agreement to either fail to disclose, or cause the prosecutors to fail to disclose, or fail to preserve, evidence material to White's criminal defense;

(2) Detective McKinley and Tina took such actions in bad faith;

(3) either Detective McKinley or Tina took an action in furtherance of their agreement; and

(4) that their agreement and one or more of their actions injured White. [Doc. # 348, Instr. 16.]

a. Agreement

First, Detective McKinley argues that there was no evidence of agreement. The jury was free to infer agreement from the circumstantial evidence presented at trial. As discussed above, that included the evidence that Detective McKinley -- an experienced detective investigating sexual abuse cases -- repeatedly disregarded accepted practices and department policy in conducting the investigation (the pre-CPC interview, the diary, and the relationship). There was also testimony indicating that Detective McKinley disregarded accepted practices by not following up on White's offer to give a statement and by lying about the circumstances of White's arrest. There was evidence that the relationship existed before the investigation was completed and that Detective McKinley and Tina lied about this to prosecutors. There was evidence of a financial motive to have White convicted of a felony. One of Tina's co-workers offered testimony indicating that Tina bragged that she and Detective McKinley were going to get rid of White. *See White*, 519 F.3d at 816 (noting that the elements of a conspiracy are rarely established through means other than circumstantial evidence). This circumstantial evidence - combined with the jury's credibility determinations of Detective McKinley's and Tina's testimony and previous inconsistencies in their statements - provided a sufficient basis for a finding that there was an agreement.

b. Act in Furtherance

Detective McKinley argues that there was no evidence of an act in furtherance of a conspiracy. The evidence regarding the lying about the relationship, failing to preserve the diary, and the pre-CPC interview alone is more than adequate for a finding of an act in furtherance. In addition, there was evidence from which a reasonable juror could conclude that Detective McKinley, under oath, misled White's lawyer about Detective McKinley's interest in the investigation: at a time when he was having a full-blown affair with Tina, Detective McKinley stated that he had no personal interest in the investigation.

4. Conclusion

Drawing all reasonable inferences in favor of White, the Court must deny Detective McKinley's motion for judgment as a matter of law. There was evidence from which a jury could find for White -- without speculation -- on both his § 1983 and conspiracy claims.

B. Motion for New Trial

Detective McKinley argues that he is entitled to a new trial or amended judgment because the Court's evidentiary rulings -- as opposed to the evidence -- improperly influenced the jury's verdict. "A motion for a new trial based on erroneous [evidentiary rulings] should not be granted unless the evidentiary ruling[s] [were] so prejudicial that a new trial would likely produce a different outcome." *Radloff v. City of Oelwein, Iowa*, 380 F.3d 344, 349 (8th Cir. 2004) (citation omitted). "On a motion for new trial, the district court is entitled to interpret the evidence and judge the credibility of witnesses, but it may not usurp the role of the jury by granting a new trial simply because it believes other inferences and conclusions are more reasonable." *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1161 (8th Cir. 1999) (citation omitted).

A movant may not use a motion for a new trial "to introduce new evidence, tender new legal theories, or raise arguments that could have been offered or raised prior to entry of judgment." *Parton v. White*, 203 F.3d 552 (8th Cir. 2000) (citation omitted). The movant must "specifically identify the alleged erroneous ruling and the improperly excluded evidence." *Moses.com Sec. Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1059 (8th Cir. 2005) (citations and internal quotations omitted). [10]

1. Evidence of Guilt

The refrain of Detective McKinley's motion for a new trial is that the Court unfairly denied him the opportunity to prove that White was guilty of the molestation allegations. At the outset of trial, the Court found that White's guilt or innocence in the criminal trials was not relevant to the ultimate issues of this case of whether Detective McKinley, in bad faith, deprived White of a fair trial and conspired with Tina to do so. In the United States, even the guilty are entitled to a fair criminal trial. *Kempe v. U.S.*, 151 F.2d 680, 690 (8th Cir. 1945). Allowing evidence of innocence and guilt absent some purpose directed to the issues in this case would have created a mini-trial (and several sub-mini-trials) on the issue of whether White was guilty of molestation.

Where evidence tending to show White's guilt or innocence was probative of another issue in the case, the Court considered whether that evidence was admissible. Several pieces of evidence and argument pointing toward White's innocence came before the jury because they were admissible, not to establish innocence but for other purposes. The Court also excluded several pieces of evidence tending to show White's innocence (evidence that Jami changed her story over time, evidence that Jami's brother contradicted her story and that Tina and Detective McKinley may have interfered with Jami's brother's testimony, medical evidence that Jami showed no physical signs of trauma despite allegations which would have indicated to the contrary, and expert opinion that Jami's stories had hallmarks of undue influence by Detective McKinley and Tina).

The Court allowed introduction of several pieces of evidence and argument pointing toward White's guilt, several slipped in without objection by White, and several came in when Detective McKinley's attorneys violated the Court's orders. The Court excluded several pieces of evidence tending only to show White's guilt, including police reports from Detective McKinley and other officers, medical reports concluding that Jami had been molested, Jami's CPC interview, testimony about potential physical evidence of molestation, testimony that White had propositioned a fourteen-year-old babysitter some time before the allegations, and testimony that prosecutors believed White was guilty.

In addition to the evidence discussed separately in his motion for a new trial, Detective McKinley is generally concerned with two particular statements. He is concerned that White testified that "the truth surfaced" at the second trial. The Court did sustain Detective McKinley's attorney's objection to the ambiguous statement (which could have referred to the "truth" about Detective McKinley and Tina's conduct), and instructed the jury that the case was not about whether White was guilty or not guilty. Detective McKinley is also concerned about White's attorneys' argument that, at the second trial, the one holdout juror "closed [his] mind[] and wouldn't deliberate," as indicating that White was not guilty of molestation. Again, the Court sustained Detective McKinley's attorney's objection to the statement.

Detective McKinley seems to argue that, because the Court found so much of White's evidence admissible, it was fundamentally unfair for the Court not to balance that admissible evidence with the inadmissible evidence proffered by Detective McKinley. However, it was up to Detective McKinley to develop his own defense with relevant, admissible evidence and persuasive argument. The Court will next discuss the specific evidentiary rulings which Detective McKinley raises in his Motion for New Trial.

2. Costa Rica

Detective McKinley argues that he should have been permitted to introduce evidence that White would have spent very little time, if any, incarcerated had he not fled to Costa Rica. [11] Detective McKinley notes that Missouri law permits criminal defendants to remain out on bond pending appeal and claims that had White not fled, he would have been on bond until his appeal was finally resolved. Based on this argument, Detective McKinley moved to exclude any evidence of White's incarceration in Costa Rica or Missouri because it was speculation to assume what would have happened had White not fled. White argued that evidence of all of White's incarceration was relevant to damages. He argues prison is the natural consequence of depriving someone of a fair trial and, therefore, he should be permitted to recover for the injuries he sustained as a result of the very harsh conditions of a Costa Rican jail.

The Court excluded evidence of White's Costa Rican incarceration, and allowed evidence of White's incarceration in the United States. The Court considered the probative value versus the prejudicial impact of flight and Costa Rican prison conditions, as well as the collateral nature of evidence that White would not have been incarcerated absent the flight. While the Court determined that a jury could not find that Costa Rican prison conditions were a foreseeable result of an unfair trial, the Court also found that it was speculation to say that White would not have been incarcerated in the United States absent his flight, particularly in the absence of testimony by White's criminal trial judge, or comparable rulings in any Missouri court, or expert testimony.

In Detective McKinley's offer of proof, Detective McKinley indicates that he would have offered the following on the issue of whether White would have been incarcerated absent his flight: White's testimony that he fled following his conviction and before sentencing in the first criminal trial; the Missouri Court of Appeals opinion; testimony from White's criminal defense attorney that he would have requested White remain free on bond pending appeal had White not fled; and testimony "about the likelihood that [White] would not have been incarcerated and free on bond following the Missouri Court of Appeals reversal of [White's] criminal conviction on April 30, 2002. Further testimony that the appellate opinion . . . would have been issued earlier in time but for [White's] voluntary flight to Costa Rica." [Doc. # 358 at 1-2.]

First, Detective McKinley does not describe what this latter "testimony" would have been, or who would have testified on the topic. Other than attempting to ask White's defense attorney whether he would have attempted to keep White out of jail pending appeal -- in violation of the Court's in limine order -- Detective McKinley did not offer such evidence at any point leading up to or during trial. Detective McKinley offered, and still offers, no actual evidence -- expert or otherwise -- that White, a convicted child molester, would have been released on bond pending his re-trial. Once the Court ruled the issue, Detective McKinley did not even seek leave to find such evidence. Nor does his offer of proof identify with any specificity the evidence which would show he would have been released on bond. This is so even though the Court gave Detective McKinley extra time after trial to make his offer of proof.

Jurors are not expected to know the intricate workings of the criminal justice system; they would have needed evidence to help them determine: (1) whether bail was available following conviction, (2) how bail would have been assessed in the trial judge's discretion, (3) how the specific factors of White's alleged crime would have influenced bail decisions, [12] (4) whether White would have received a bond at any particular point, (5) the amount of that bond, and (6) whether there was money for the bond. Because Detective McKinley did not provide a non-speculative foundation for admission of the flight, it was inadmissible under Rules 104(b), 401, 402, and 403 of the Federal Rules of Evidence. *See Murphy v. Missouri Dept. of Corr.*, 506 F.3d 1111, 1116 (8th Cir. 2007).

At the request of Detective McKinley, the Court prevented the Plaintiff's testimony about prison conditions in Costa Rica. Thus, the Court ensured that neither side would benefit from the Costa Rica detour.

3. Prior Trials

Detective McKinley argues that the Court should not have admitted evidence that White's second trial resulted in an eleven-to-one hung jury, and that his third trial resulted in acquittal. Detective McKinley relies on cases stating that evidence of acquittal is not admissible to establish innocence or as collateral estoppel in a later case. However, evidence of acquittal is admissible for other purposes. *See, e.g., Monteiro v. City of Elizabeth*, 436 F.3d 397, 406 (3d Cir.) (finding that the district court did not abuse its discretion in allowing evidence of acquittal to show damages), *cert. denied sub nom, Perkins-Auguste v. Monteiro*, 549 U.S. 820, 127 S. Ct. 116, 166 L. Ed. 2d 34 (2006); *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998) (indicating that evidence of acquittal would be admissible to establish damages for wrongful incarceration in denial of access to courts claim); *Sloman v. Tadlock*, 21 F.3d 1462, 1472 (9th Cir. 1994) (finding that evidence of acquittal was properly admitted to establish damages regarding cost of defending improper criminal charges). Here, the Court admitted the evidence of the acquittal and the hung jury, finding it relevant to the issues of damages and causation; i.e., whether exculpatory evidence "would have put the case in a different light so as to undermine confidence in the outcome." [Doc. # 348, Instr. 15, 16.] The jury could consider the fact that the one criminal jury that did not hear the undisclosed/unpreserved evidence convicted White, whereas the two criminal juries who heard it did not. [13]

In response to the evidence of the hung jury and the acquittal, Detective McKinley attempted to show that White's second and third trials had outcomes different than the first for reasons other than the newly-admitted evidence concerning the relationship, diary, and pre-CPC interview. For example, he introduced evidence and argued that White had a better legal team for those trials than he did for the first and those trials took substantially longer. The jury was allowed to consider this evidence. Yet Detective McKinley's counsel did not devote as much time to developing the evidence helpful to him as he did to arguing about excluding evidence helpful to White.

The Court specifically invited Detective McKinley to submit a limiting instruction on the issue of the hung jury and acquittal. He did not submit such an instruction in writing, and points to no portion of the record where he contends he made a verbal request for such an instruction. To the extent Detective McKinley is concerned that the jury considered the hung jury and the acquittal as evidence that White was innocent of molestation, the Court made it clear that that issue was not before the jury. (Tr. at 347.)

4. Testimonial Immunity

Detective McKinley argues that the Court erred by not recognizing that he had testimonial immunity with regard to incomplete or false statements he gave during a deposition in the criminal proceedings. In support of this argument, Detective McKinley cites to a § 1983 case where a police officer was found to have immunity where a plaintiff sought damages for the officer's perjured statement. *See Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Here, White did not seek damages based on perjured testimony; he sought damages based on an alleged bad faith withholding of potentially exculpatory evidence. *See Manning v. Miller*, 355 F.3d 1028, 1033 (7th Cir. 2004) (stating that *Brady* claim encompassing false testimony was not impermissible run around testimonial immunity where claim went well beyond that testimony itself). The Court allowed White to question Detective McKinley regarding the deposition testimony as it was relevant to whether Detective McKinley was acting in bad faith with regard to disclosing the relationship. (Tr. at 486- 490). [14]

Detective McKinley also argues that the Court should have admitted testimony from Prosecutor Mettler that, after Detective McKinley's deposition, he asked Prosecutor Mettler whether he had testified correctly and Prosecutor Mettler stated that he had done so. (Tr. 1714 (emphasizing, on questioning by the Court, that this was Detective McKinley's argument regarding Prosecutor Mettler's testimony on Detective McKinley's deposition)).

Detective McKinley testified at length concerning his deposition testimony; he testified that it was truthful and offered an explanation for how it could be interpreted as such; his lawyer argued his explanation in closing. (Tr. at 576-589, 1677-86, 1692-94, 1784-85, 2035-36.) To the extent that Detective McKinley, albeit ineffectively, intended to argue that his very questioning of Prosecutor Mettler about whether his testimony was appropriate showed that he was not acting in bad faith, refusal to admit evidence of the questioning via Prosecutor Mettler does not warrant a new trial, given the substantial evidence of bad faith in this case and the ambiguous inference that could be drawn from Detective McKinley's inquiry. Even if such evidence had been admitted, there is no reasonable likelihood, given the testimony of Tina and Detective McKinley, that the outcome of this case would have been different.

5. Investigation

Detective McKinley complains that he was entitled to introduce evidence of the entirety of the investigation to demonstrate the thoroughness and quality of the investigation. However, Detective McKinley sought only to introduce the substance of the evidence his investigation revealed, not the protocols he followed or the steps he took in completing the investigation. Detective McKinley, in essence, argues that, because the jury was not permitted to hear evidence that White was guilty of molestation, the jury could *only* infer that Detective McKinley acted in bad faith. Detective McKinley asserts that "each and every aspect of [his] investigation should have been presented to the jury so they could make the ultimate determination as to whether the investigation was good, bad, or somewhere in between." [Doc. # 369 at 16.] This clarifies Detective McKinley's fundamental misunderstanding of the case. White may have been guilty and Detective McKinley may have conducted an otherwise acceptable investigation, but if he deliberately suppressed or failed to preserve specific evidence in bad faith, he violated White's right to a fair trial. The fact that Detective McKinley thoroughly investigated Jami's complaint does not indicate that he had a good faith reason for not securing the diary or failing to reveal to the prosecutor his true relationship with Tina. Evidence that Detective McKinley revealed other exculpatory proof would logically show that his omission as to the diary, relationship and PCP exam was unintentional; but doing a good job to find evidencethat tended to prove White's guilt does not.[15] Indeed, showing that he conducted a thorough investigation, except for leaving the diary with the complaining witness, failing to document pre-CPC interview and making misleading statements about his relationship with Tina, would tend to show he was acting in bad faith, not good faith; i.e., he knew how to conduct a thorough exam but chose not to when it came to exculpatory evidence.

Finally, the inflammatory and collateral nature of the investigation evidence -- which was, in essence, evidence of White's guilt -- would have far outweighed any probative value in showing that Detective McKinley's investigation was thorough.

ı. Arrest

Detective McKinley complains that the Court should not have permitted White to introduce evidence concerning Detective McKinley's arrest of White at his workplace, especially because the Court did not permit Detective McKinley to introduce all the evidence gathered in the investigation. The Court admitted that evidence as relevant to bad faith: White's contention was that Detective McKinley normally would allow a defendant to surrender but arrested White instead, in a malicious effort to embarrass him. There was testimony indicating that White's criminal attorneys had made arrangements for White to surrender voluntarily. There was testimony indicating that Detective McKinley may have lied to his sergeant about whether Detective McKinley arrested White, or whether White surrendered. Detective McKinley had the opportunity to present evidence addressing whether the arrest was proper and typical, but he did not. The manner in which Detective McKinley interacted with White on the one occasion when they had face-to-face contact was relevant to whether Detective McKinley acted in bad faith.

ɔ. Fourteen-year-old Babysitter

Detective McKinley complains that the Court excluded evidence that, years prior to the molestation allegations, White asked a fourteen-year-old babysitter to kiss him. Because White denies the incident and several witnesses were involved, this issue presented another opportunity for a mini-trial on whether the event actually occurred. It is also only relevant to the issue of guilt or innocence. [16] More importantly, the evidence is excludable because proof of proclivity is not generally admissible under the Federal Rules of Evidence.

Detective McKinley argues that the evidence should have been admitted under Rule 415 of the Federal Rules of Evidence (stating that evidence of a civil *defendant's* prior commission of *sexual assault or child molestation* may be considered). The Court is unwilling to extend that Rule - intended to protect sexual assault victims - so as to allow testimony of a *plaintiff's prior misconduct in a case alleging police misconduct.* Particularly in a case in which the plaintiff's guilt or innocence is not relevant to the ultimate issues. *See generally Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998) (finding, in § 1983 case of sexual harassment against correctional officer, that evidence of officer's treatment of other inmates was inadmissible). This highly-inflammatory testimony has little, if any, probative value on any issue other than White's guilt, and under the Federal Rules of Evidence, it is not even admissible to show guilt when it is being offered against a plaintiff in a case involving police misconduct.

c. March 8

Detective McKinley argues that the he should have been permitted to introduce evidence that White molested Jami on March 8, 1998, a date on which Jami alleged molestation and for which White claimed an alibi. Specifically, Detective McKinley asserts that he should have been allowed to introduce evidence that Nina Morerod found blood on Jami's panties the following day. White disputed this evidence, indicating there was evidence that Morerod was unsure of the date, that the blood spot may have been the result of an infection for which Jami had been treated, that adolescent Jami had complained of stomach cramps in that time frame and may have started her period, and that spotting was not consistent with the abuse which allegedly occurred on March 8. Detective McKinley offered this evidence to establish "the truth of what Jami [alleged]." (Tr. at 1002.)

While not allowing the inflammatory details, the Court did admit evidence that Jami said she had been abused by her father on March 8. The Court also permitted evidence that Tina knew White had an alibi for that date, which tended to explain why Detective McKinley avoided interviewing White; *i.e.*, he did not want to include in the file a verifiable alibi for March 8, because that would undermine the strength of his case against White.

The Court also admitted testimony which permitted the jury to draw inferences in favor of Detective McKinley concerning the March 8 allegations. Tina testified that White was at home alone with Jami on that day. One of White's alibi witnesses testified on cross-examination that there was a time period on March 8 when the witness did not know of White's whereabouts, and Detective McKinley's attorney argued at closing that

White was alone with Jami on that day, bolstering Jami's credibility.

As Detective McKinley did not demonstrate that the blood spot evidence was relevant to anything other than guilt, the Court did not allow the evidence.

3. Prosecution

Detective McKinley argues that the Court should have allowed the prosecutors involved in White's criminal trials to testify about the evidence on which they relied, their follow-up investigations, and their position with regard to disclosing the relationship between Tina and Detective McKinley. Specifically, Detective McKinley contends the Court should have admitted the following evidence regarding the prosecutors: (1) what the prosecutors relied on to prosecute White; (2) the probable cause statements of Prosecutor Kanatzar; (3) testimony that the ability of the prosecutors to prove their case beyond a reasonable doubt depended on Jami's testimony and that of the CPC doctor; (4) testimony that Prosecutor Mettler personally interviewed a number of witnesses and learned of facts not included in Detective McKinley's investigation including the pending divorce between White and Tina as well as additional facts which Detective McKinley did not uncover; (5) testimony that the prosecutors did not believe the relationship was exculpatory; and (6) testimony that it was the prosecutor's fault that the relationship was not disclosed to White. Though he lists evidence he would have liked to introduce, he does not indicate which Court rulings prevented that evidence, nor does he articulate a basis for admissibility of that evidence. The Court does not recall some of this evidence ever being mentioned and cannot locate its mention in the transcript or pretrial proceedings.

Assuming Detective McKinley has not waived some of his arguments concerning the prosecution evidence, the Court will address the evidence about which he complains in turn. (1) The prosecutors' opinions about Detective McKinley's credibility: this is simply not an appropriate subject for any witness to testify about. (2) The prosecutors' testimony concerning probable cause: probable cause was not relevant after the Court granted summary judgment to Detective McKinley on that issue. (3) The prosecutors depending on testimony from Jami and the CPC doctor: Detective McKinley articulated no basis for admitting testimony concerning whether the prosecutors believed White was guilty. It is reasonable to assume that a juror would conclude that if a prosecutor decides to prosecute a defendant, she believes the defendant to be guilty. However, the prosecutor's belief that White was guilty is not relevant to whether Detective McKinley withheld exculpatory evidence in bad faith. (4) Additional facts learned by the prosecutors: the Court did not preclude Detective McKinley from introducing evidence that the prosecutors knew of the divorce; Detective McKinley's argument concerning "other facts" does not provide a basis from which the Court can identify any ruling excluding Detective McKinley's desired evidence. (5) The prosecutors' belief concerning the exculpatory nature of the relationship: Detective McKinley does not indicate what probative value there would be in testimony that Prosecutor Mettler, in her response to White's motion for new trial after his conviction, believed the diary and the relationship were not exculpatory -- especially absent evidence that

Prosecutor Mettler had considered the full extent of the relationship. (6) The prosecutor's decision not to disclose the relationship: the Court did allow Prosecutor Mettler to testify that she made the decision not to disclose the relationship to White; she stated this decision was based on her understanding that the relationship did not pre-exist Jami's allegations.

Though Detective McKinley's argument implies that the Court did not allow any evidence of the prosecution, the Court did allow Detective McKinley to introduce prosecutorial evidence which was probative of the issues in this, as opposed to the criminal case. Furthermore, even if the excluded evidence had come in, the Court does not believe it would have changed the outcome of the case. The prosecutors did not know all the evidence submitted in the civil case and Detective McKinley's and Tina's testimony was sufficiently unbelievable that a jury would have found bad faith even if the prosecutors had been allowed to testify about their belief that the evidence was not exculpatory, particularly in light of the Missouri Court of Appeals opinion.

7. Detective McKinley's Role

Detective McKinley appears to argue that the Court erred by rejecting evidence of an "inter-agency agreement" which limited Detective McKinley's role in the investigative process. Detective McKinley does not indicate where in the record this occurred. Assuming that Detective McKinley did offer such evidence and the Court excluded it, such a ruling was appropriate. Detective McKinley seems to be re-arguing the issue of qualified immunity: he cites *Clemmons v. Armontrout*, 477 F.3d 962 (8th Cir. 2007), a qualified immunity case decided before the Eighth Circuit's decision in this case. Moreover, no reasonable police officer could believe that he had a right to withhold or fail to preserve evidence in bad faith because he had a limited role in an investigation -- in fact, just the opposite.

8. Financial Motivations

Detective McKinley argues that the Court erred by excluding evidence of the value of certain assets years after the events in question in this case. White introduced evidence that, prior to the molestation allegations, Tina stood to benefit financially from White being convicted of a felony: there was evidence indicating that certain stock belonging to White would transfer to Tina if he were convicted of a felony, and evidence that the Whites had an extravagant lifestyle prior to the allegations. Detective McKinley sought to introduce evidence of the value of the stock at the time it was sold and evidence of the value of the White's marital estate at the time their divorce became final. Both pieces of evidence reflected value years after the allegations were made. The Court excluded this evidence because it was not probative of whether, at the time of the allegations, there was a financial motive for withholding evidence that would be helpful to White's defense; Detective McKinley states no other basis on which his proffered evidence would be relevant.

9. Marital Discord

Detective McKinley argues that the Court should have allowed Tina to testify to the reasons why her marriage to White failed. The Court specifically deferred ruling on whether it would allow defense counsel to inquire into the area when Tina was on the stand. Detective McKinley does not include a cite to the record where he attempted to elicit such testimony from Tina.

However, because the issues presented another opportunity for a series of tangential, inflammatory mini-trials of limited probative value, the Court did exclude evidence of White's gambling, drug and alcohol use. [17] Even if White's prior bad acts should have been admitted, the exclusion of this evidence does not warrant a new trial. Given the other evidence in the case, there is no reasonable likelihood the result would be different.

10. Special Interrogatories

Detective McKinley argues that the Court should have submitted to the jury the special interrogatories which were proposed by Detective McKinley. [Doc. # 308 at 75.] The interrogatories are attached to this Order. The Court rejected the proposed interrogatories because they either request factual findings on issues that are not relevant; *e.g.* guilt or innocence, or are confusing (*e.g*, "Do you believe that Plaintiff Theodore White did not sexually abuse Jami because of information that would have been in Jami's diary."). They would also tend to mislead the jury about the proper findings required to return a verdict for Plaintiff or Defendants. Moreover, Detective McKinley does not point to any error in the verdict directing instructions that make these special interrogatories needed for clarification. Finally, he does not show how these interrogatories were needed to present his qualified immunity defense.

The jury could not have found in favor of Plaintiff unless it concluded the Defendants acted in bad faith. There is no qualified immunity defense if Detective McKinley acted in bad faith.

11. Trial Court Bias

Detective McKinley argues that he is entitled to a new trial because the Court was biased against him. First, Detective McKinley is concerned that the Court admonished his counsel in front of the jury. At voir dire, outside the hearing of the jury, the Court told Detective McKinley's lawyer not to ask questions regarding maintenance of diaries; he appeared to be educating the jurors about the case rather than identifying information to use for peremptory strikes or strikes for cause. The Court had previously told the parties not to use voir dire to advocate their case; rather questioning should focus on selecting an unbiased jury. The Court gave Detective McKinley's lawyer some latitude but even after a side bar admonishing the lawyer to stop, he continued to inquire into areas that a reasonable lawyer would have known were improper based on the Court's prior rulings. Attorneys instructed in the past under similar circumstances have had no difficulty understanding the Court's direction. The Court eventually admonished Detective McKinley's lawyer in front of the jury. (Doc. # 373, Tr. at 105-108.) During opening statements, the Court sustained multiple objections that Detective McKinley's lawyer was offering argument, yet he continued to do so. It was the Court's strong opinion that he was intentionally ignoring the Court's rulings, making argument immediately after the Court's ruling sustaining the Plaintiff's objection. He simply breezed by the Court's ruling and continued to make obvious argument. Eventually, the Court precluded such improper conduct by stopping his opening statement near its conclusion, hoping to get control of the attorney at an early stage of the trial.

Further, Detective McKinley is concerned that the Court found his lawyer in contempt. As to the first finding, the Court did so based on Detective McKinley's lawyer's repeated speaking objections. (Tr. 856-908.) All parties had been told before trial not to make speaking objections and the Court did not hold Detective McKinley's lawyer in contempt until he had violated the rule several times. Detective McKinley admits that the first finding of contempt was "arguably" justified. The second contempt finding was based on a "pleading poverty" objection. The Court invited Detective McKinley's lawyer to produce a good faith basis for that objection and stated that it would reconsider the contempt finding if he did so (Tr. at 908); he did not and has not. The third contempt finding was based on Detective McKinley's lawyer ignoring the Court's prior evidentiary rulings. (Tr. at 1818.) The fourth contempt finding was for asking a specifically-prohibited question. (Tr. at 1857.) "Adverse rulings alone do not constitute personal bias and prejudice." *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1330-31 (8th Cir. 1985) (citation omitted). If anything, the Court was too lenient with Detective McKinley's attorney given his continued willingness to violate the Court's orders. It would be ironic if a lawyer could persistently misbehave and then accuse the Court of bias because attempts were made to stop the

In addition, Detective McKinley claims that unidentified persons reported to him that Court visibly "teared up" during White's testimony. Detective McKinley points to no place in the transcript where his attorney made a contemporaneous record on this allegation. The reason attorneys are required to make a contemporaneous record is to prevent unfounded allegations being made after the fact, placing the court in a factual dispute with the parties. If permitted, this would be a way to derail a trial that was not going well for one of the parties.

Moreover, to ensure that a judge's conduct in the courtroom does not affect a jury's verdict, the jury is instructed not to consider anything that a judge may say or do as indicating what the judge thinks of the evidence or what the judge thinks the verdict should be. (Instructions 1, 10 and 19 are attached to this Order). These instructions make clear to the jurors that they are not to consider the judge's conduct when rendering a verdict. The Court reread the instructions to the jury at the conclusion of trial and then voir dired the jury to determine whether they would be able to follow the instructions. The jurors indicated they would. [18] Hence, there is no possibility that the jurors' verdict was affected by any conduct of the Court and Detective McKinley's argument to the contrary is frivolous.

12. Conclusion

Detective McKinley argues that, taken as a whole, the Court's rulings made a finding in favor of the White inevitable. Detective McKinley fails to recognize that evaluation of the witnesses' credibility and Detective McKinley's trial strategy. Moreover, Detective McKinley has articulated no other reasonable manner in which the Court should have conducted the trial. The only possible alternative was to let all evidence in -- relevant or not -- and have a series of mini-trials and sub-mini-trials on tangential, inflammatory issues which would have likely lasted weeks or months. The strains on the litigants, the jurors, and the judicial system caused by proceeding in such a manner weigh against such broad admission of evidence; the Courts' appropriate rulings resulted in a manageable and understandable trial.

Finally, in considering whether the jury's verdict equates to a miscarriage of justice, the Court has considered all of the evidence - even that excluded - as well as the extensive testimony of Detective McKinley himself. It is undisputed that Detective McKinley did not take custody of the diary and the Missouri Court of Appeals has already held that even a lay person would know it should not be left with the complaining witness. The substantial weight of the evidence demonstrates that Tina and Detective McKinley were not truthful with the prosecutors and it is unrefuted that Detective McKinley was told to end the affair by the Chief of Police and did not. Furthermore, Tina told a co-worker that her boyfriend policeman was helping to get rid of Tina's husband. Even ignoring the rest of the evidence about which Detective McKinley complains, it is reasonable to expect that a juror would find in White's favor; particularly, given the credibility of Tina's and Detective McKinley's testimony and the failure of

Even if the Court had ruled in favor of Detective McKinley on every disputed point, it would not find that the trial outcome likely would have been different. *See generally Wilson v. City of Des Moines*, 442 F.3d 637, 641 (8th Cir. 2006) ("Only when the evidence excluded is of such a critical nature that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted" does a district court abuse its discretion in denying a motion for a new trial) (citation and internal quotations omitted).

III. Motion to Alter or Amend Judgment

Echoing his motion for a new trial argument concerning White's flight to Costa Rica, Detective McKinley argues that the damages award was excessive because it does not reflect time White would not have spent in jail absent the flight. At trial, White argued for $ 1.6 million in economic damages plus $ 3 million per year of incarceration; the jury awarded $ 14 million in actual damages. Detective McKinley complains he should have been allowed to argue that, had White not fled, his conviction would have been reversed earlier and he would not have been incarcerated following that reversal. Detective McKinley requests that judgment be amended "to comply with evidentiary standards."

Though Detective McKinley asks the Court to enter judgment complying with evidence, he still does not explain what that evidence would be. Had Detective McKinley indicated that he had the necessary testimony showing White would have been out on bond, the Court could consider granting his motion. But he trial motions.

"The jury's verdict should not be set aside or altered unless it 1) is flagrantly excessive or inadequate, 2) is so out of reason as to shock the conscience or sense of justice, 3) raises a presumption it is the result of passion, prejudice, or other ulterior motive, or 4) is lacking in evidentiary support." *Schooley v. Orkin Extermination Co.*, 502 F.3d 759, 768 (8th Cir. 2007). The evidence supported a finding that Detective McKinley deprived White of a fair trial by failing to disclose or preserve exculpatory evidence in bad faith, and that Detective McKinley conspired with Tina to do so. The evidence showed that White suffered financial and emotional losses and physical abuse in prison as a proximate result. The jury even found that punitive damages were appropriate. The Court cannot say that the jury's verdict falls within any of the categories allowing altered judgments.

IV. Conclusion

Accordingly, it is hereby ORDERED that Defendant Detective McKinley's Motion for Judgment as a Matter of Law [Doc. # 367] and Motion for New Trial and Alternative Motion to Alter or Amend Judgment [Doc. # 369] are DENIED.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: March 26, 2009

Kansas City, Missouri

SPECIAL INTERROGATORIES TO THE JURY SUBMITTED BY DEFENDANT RICHARD MCKINLEY

1. Do you believe that Theodore White sexually abused Jami?

[] Yes [] No

2. If you believe that Theodore White did not sexually abuse Jami, do you believe that because you believe Jami was not telling the truth?

[] Yes [] No

3. Do you believe that Plaintiff Theodore White did not sexually abuse Jami because of information that would have been in Jami's diary?

[] Yes [] No

4. Do you believe that Jami was not telling the truth about Plaintiff Theodore White sexually abusing her because Richard and Tina McKinley failed to disclose the nature and extent of their personal relationship to prosecutors?

[] Yes [] No

5. Do you believe that Tina and Richard McKinley had a personal relationship prior to Jami's allegations of sexual abuse?

[] Yes [] No

6. Do you believe the absence of Jami's diary deprived Theodore White of a fair criminal trial?

[] Yes [] No

7. Do you believe that Defendant Richard McKinley made a conscious effort to fail to secure Jami's diary or aid in the disappearance of Jami's diary?

[] Yes [] No

8. Do you believe Theodore White would have been deprived of a fair criminal trial if the Jackson County, Missouri Prosecutor's office would have disclosed the romantic relationship between Tina and Richard McKinley to Theodore White's criminal defense lawyers prior to his first criminal trial?

[] Yes [] No

9. Do you believe that Defendant Richard McKinley made a conscious effort to misinform the prosecutor of the nature and extent of his personal relationship with Tina McKinley?

[] Yes [] No

nstruction 1

Ladies and Gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

This is a civil case brought by the Plaintiff Theodore White against the Defendants Richard and Tina McKinley. The plaintiff alleges that the defendants intentionally deprived him of his right to a fair trial as secured by the United States Constitution. The defendants deny that allegation. It will be your duty to decide from the evidence whether the plaintiff is entitled to a verdict against the defendants.

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony and the extent to which their testimony is consistent with other evidence that you believe.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

Instruction 10

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

Instruction 19

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if th discussion persuades you that you should. But do no come to a decision simply because other jurors think i is right, or simply to reach a verdict. Remember at al times that you are not partisans. You are judges judges of the facts. Your sole interest is to seek th truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through th courtroom deputy, signed by one or more jurors. I wil respond as soon as possible either in writing or orally i open court. Remember that you should not tell anyone including me - how your votes stand numerically.

Fourth, your verdict must be based solely on th evidence and on the law which I have given to you i my instructions. The verdict must be unanimous Nothing I have said or done is intended to suggest wha your verdict should be - that is entirely for you t decide.

Finally, the verdict form is simply the written notice o the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the courtroom deputy that you are ready to return to the courtroom.

Footnotes

1 These motions are presented in the alternative, requesting: first, judgment as a matter of law; second, a new trial; and, third, altered or amended judgment.

2 Tina is now married to Detective Richard McKinley ("Detective McKinley"). For the sake of clarity, she will be referred to as Tina throughout the opinion rather than by her surname.

3 Missouri has an escape rule that normally precludes any appeal when a defendant has fled the jurisdiction after conviction but before sentencing.

4 White also filed claims based on other constitutional torts and various common law torts. The court granted summary judgment in favor of Tina and Detective McKinley on these other constitutional claims and White eventually dismissed the common law torts. The City of Lee's Summit, Detective McKinley's employer, was also sued by White, but settled with White early in the litigation.

5 The facts are viewed in the light most favorable to the jury verdict. *See Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F. 3d 1001, 1009 (8th Cir. 2008). The Court will not attempt to summarize all the evidence because it is voluminous.

6 Tina told Prosecutor Mettler she had asked Jami for the diary but Jami denied that her mother ever asked her for the diary. Jami also testified that her mother knew where the diary was kept. No one can now remember what happened to the diary.

7 A significant portion of Detective McKinley's JMOL

is devoted to rearguing the issue of qualified immunity already decided by the Eighth Circuit. Because there is ample evidence to prove all the facts relied on by the Eighth Circuit when it denied Detective McKinley's Motion for Summary Judgment on qualified immunity, the Eighth Circuit's opinion stands as the law of the case. *See Unigroup, Inc. v. Winokur*, 45 F.3d 1208, 1211 (8th Cir. 1995) (stating that doctrine of law of the case prevents relitigation of settled issues in an action, protecting parties' expectations, and ensuring uniformity of decisions, and promoting judicial efficiency); *Jones v. United States*, 255 F.3d 507, 510 (8th Cir. 2001) (stating that law of the case doctrine extends to all issues implicitly settled by appellate court, not just to actual holdings). Moreover, even if the issue of qualified immunity were to be relitigated, the evidence demonstrates that Detective McKinley is not entitled to qualified immunity because he withheld potentially exculpatory evidence in bad faith. Detective McKinley's argument that a police officer has no obligation to preserve exculpatory evidence if he tells the prosecutor about it is also contrary to the Eighth Circuit's opinion in this case. The Eighth Circuit held that a police officer is responsible if he withholds the evidence in bad faith . Furthermore, there is ample evidence that Detective McKinley did not truthfully tell the prosecutor about the evidence he now claims to have revealed.

[3] At oral argument on his post-trial motions, Detective McKinley argues for the first time that the firefighter statement was only admissible as an admission by a co-conspirator if it was made in connection with the conspiracy; Detective McKinley claims that any such statement occurred before the alleged conspiracy began

and was, thus, inadmissible: Detective McKinley did not raise this argument at trial - he cites to no place in the record where he did so - and he offered no limiting instruction with regard to the statement. The statement is obviously admissible against Tina, and because Detective McKinley did not timely request a limiting instruction, this argument should be deemed waived. Had the request been made at trial, the issue could have been expeditiously resolved.

9 The Court assumes that Detective 9 McKinley made an error in the heading of his argument when he suggested that prosecutors were aware of his pre-CPC interview. There is no such evidence and no good faith basis for arguing that such evidence existed.

10 Detective McKinley fails to cite to the record for several of his arguments. The Court has endeavored to locate support for his arguments in the record, and will only note his omission where it appears he waived an argument by not giving the Court an opportunity to address it at trial.

11 Detective McKinley also argues that White's conviction would have been reversed sooner had White not fled. According to Detective McKinley, White's lawyers learned of the relationship between Detective McKinley and Tina within a few weeks of White's flight; Detective McKinley argues that the lawyers could not take any action on the information -- such as request a new trial or remain out on bond pending appeal -- because White was a fugitive whose whereabouts were unknown. Detective McKinley did not raise this argument at trial and does not include a cite to the record where he contends that he did. This is so even hough the issue of Costa Rica was discussed at great ength both pretrial and during the trial.

12 At least as to the time period following White's conviction, Section 547.170 of the Missouri Revised Statutes indicates that bail was not available, as White was convicted of a sexual offense where the victim was ess than seventeen years of age. Detective McKinley's attorney never distinguished at trial between release following reversal and release on bond pending appeal.

13 Evidence of the second and third trials was also generally relevant to the issue of damages: the jury could infer that, had White received a fair trial in the first instance, he would not have had to undergo the second and third trials or incur related fees.

14 The Court, however, did not allow Prosecutor Mettler to offer a prohibited opinion on Detective McKinley's credibility; though, at one point in closing argument and in violation of the Court's order, White's attorney used the word "perjury" in reference to Detective McKinley's deposition testimony, the Court sustained Detective McKinley's attorney's objection.

15 When questioned by the Court, Detective McKinley's attorney specifically stated that he did not eek to introduce evidence of his investigation to establish that Detective McKinley had so much evidence of guilt that he did not take the diary into ustody because it was merely cumulative.

6 Detective McKinley now attempts to argue - as he did not at trial -- that the babysitter evidence is elevant to show that any of his alleged shortcomings

were understandable in light of the significant evidence of guilt. The Court carefully considered the arguments Detective McKinley did make about admissibility of the evidence, and even considered changing its ruling after trial had commenced, but Detective McKinley specifically disavowed the argument he now makes.

17 Detective McKinley complains that White was permitted to testify that the marriage dissolved because of Tina's greed and infidelity, but White's testimony concerning infidelity was limited to that of the firefighter statement. Other than his objection to the firefighter statement -- which was relevant to the issue of whether the relationship preexisted the allegations -- Detective McKinley does not indicate where he objected to White's testimony in this regard.

18 The Court did this because of earlier allegations by McKinley's counsel that he was not being treated fairly.

Nos. 07-1002/07-1166
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Theodore W. White, Jr., Appellee,
v.
Detective Richard McKinley, Individually and in his official capacity; Tina McKinley, Appellants.

October 19, 2007, Submitted

February 26, 2008, Filed

Before BYE, BOWMAN, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Theodore White, Jr. brought this civil action following his prosecution, conviction, re-prosecution, and eventual acquittal for the alleged molestation of his adopted daughter. White sued his ex-wife, Tina McKinley, and the police officer who investigated the molestation charges, Richard McKinley, who is also Tina's current husband. White alleged a deprivation of constitutional rights and various common law torts. The McKinleys moved the district court for summary judgment on all counts, based, at least in part, on a qualified immunity defense, and both motions were denied in part and granted in part. The district court n1 denied Richard's motion as to (1) the 42 U.S.C. § 1983 conspiracy claim and (2) the 42 U.S.C. § 1983 claim based on suppression of exculpatory evidence. Tina's motion was denied as to (1) the 42 U.S.C. § 1983 conspiracy claim, (2) false arrest claim, and (3) malicious prosecution claim. Tina and Richard bring this interlocutory appeal arguing that the district court should have granted their summary judgment motions in their entirety. We affirm.

. *Background*

The following facts are uncontested or viewed in the light most favorable to White, the non-moving party. White married Tina in 1991. At the time, Tina had two children, a boy and a girl, from a previous marriage. Consistent with Tina's wishes, White agreed to adopt Tina's children, but Tina's first husband would not agree to terminate his parental rights. Sometime later, Tina petitioned a state court for an order of protection against her first husband, alleging that he had threatened to kill her and White and had physically abused her during their marriage. In a later deposition, Tina denied her first husband was ever violent with her. Likewise, White denies that he was ever threatened by Tina's first husband. In 1995, Tina's first husband ended his opposition to White's adoption and consented to terminate his parental rights. Tina told a friend she obtained her first husband's consent by threatening to charge him with child molestation. White adopted Tina's children in January 1996.

During his marriage to Tina, White was a CEO and major shareholder of a company making an initial public offering (IPO) of its stock. White's portion of the stock was worth approximately $ 400,000, and the IPC documents contained a provision that specified that all of White's stock would be transferred to Tina if White was ever convicted of a felony. Tina requested that White transfer half of the stock into her name, but he refused

Tina and White's marriage deteriorated in 1997, leading to White's eventual expulsion from the home in September 1997. Tina and her children packed up White's belongings and put them outside with a note asking that he take his things and leave. When White came home he pounded his way through the door, which Tina had barricaded, and went to his bedroom. Tina contacted the Lee's Summit Police Department ("the police department") to report that her husband had broken through the door and shoved her down. The police arrived and arrested White.

White and Tina separated in October 1997, and Tina filed for divorce one month later. Thereafter, White and Tina temporarily reconciled and White moved back in for the sake of the children. At that time, White was beginning a new business with a potentially very profitable future. Tina worked for White's new company as a receptionist. The relationship soured again after Tina was seen looking through confidential payroll files. Afterwards, White limited Tina's access to the family's finances. White also asked a business associate to pay the family's bills and to give Tina a $ 1,500 per month allowance.

Two weeks later, Tina called the police department to accuse White of molesting her twelve year old daughter. Tina also filed for an order of protection and requested $ 6,165 in monthly child support and maintenance. Due to the accusations, White was forced to step down from his company and, when the divorce became final in December 1999, the divorce court awarded Tina all of White's shares in his previous company then valued at approximately $ 600,000.

Following the molestation accusation, an officer interviewed Tina's daughter and wrote an initial report. After that, the investigation was assigned to the department detective in charge of investigating sexual abuse allegations, defendant Richard McKinley. On March 25, 1998, Richard advised Tina by phone of his role in the investigation of her daughter's alleged molestation. Richard's case-file notes state that this phone call was his first contact with Tina, but the parties dispute whether this was really Richard and Tina's first encounter. According to the children's nanny, Richard--already an acquaintance of Tina's--came to Tina's home in plain clothes after White's arrest in September 1997 and measured the damaged door. That incident occurred long before the molestation allegations surfaced.

Richard departed from his normal investigatory protocol in White's case. Richard seldom initially spoke with the child at the center of an abuse investigation, because that was normally the social worker's domain. White offered evidence that Richard met with Tina's daughter before the child met with the assigned social worker. During his interview with the alleged victim, Richard discussed the meaning of different sexual terms and asked Tina's daughter about viewing pornographic videos with her father. Richard took six pornographic videos from the house as evidence.

Richard also reviewed Tina's daughter's diary. The diary contained no entries related to the alleged sexual abuse, and Richard did not take the diary as evidence. n2 White sought the diary in discovery but never received it. White knew of the diary's existence because Tina had shown it to him when they were married. Tina had been upset that her daughter had written that Tina was not an affectionate mother. White had also read in the diary that Tina's daughter felt White was a good father and that the girl wanted to spend more time bonding with White at the family's lake house. When asked to produce the diary during White's first criminal trial, Tina told the prosecutor that it was lost. Tina's daughter, however, testified in a deposition that Tina had never asked her to look for it.

As part of the molestation investigation, Tina's daughter underwent a physical exam. The exam showed no physical signs of the type of molestation that she claimed had occurred within the prior three weeks. The report did indicate that the girl's description of abuse was consistent with other abuse cases. Richard later questioned Tina at her home for two hours without the children present as part of the investigation. Richard claimed he needed Tina to corroborate her daughter's account of abuse since there was no physical evidence of abuse, no confession of the abuser, and the allegations were being made within the context of a recently filed divorce--a time when false abuse accusations are common. Richard learned that Tina had taken notes about the abuse, and he took custody of those notes to corroborate her daughter's accusations. Tina also told Richard about other suspicious behavior of White towards her daughter that she had witnessed. Many of the incidents she discussed had not been mentioned by her daughter during her interview with the social worker.

Richard did not mention White and Tina's pending divorce in any of his police reports. He did not review any records or pleadings from the divorce proceedings even though he knew that abuse allegations during divorce were a "red flag." Richard did not interview White during his investigation despite White's attempts to make himself available. Richard had testified in an unrelated case that it is standard procedure for the lead investigator in a child molestation case to speak to the accused if they are willing to talk. n3

In April 1998, while investigating the allegations against White, Richard developed strong romantic affection for Tina and asked her out. By that time, the prosecutor had filed charges against White, but Richard remained the lead investigator on the case. Tina and Richard began seeing each other in May, and the relationship became sexual. Richard told his police chief that he was having an affair with Tina in June, and the chief urged him to stop the affair and to tell the prosecutor. Richard told the prosecutor that he and Tina had met for a single date. He did not disclose that their relationship was sexual or that he had any contact with Tina prior to the March 26th interview with Tina's daughter. The prosecutor, believing only one date had occurred, chose not to disclose Richard's relationship with Tina to the defense.

In the fall of 1998, the prosecutor first learned that Tina and Richard were actually having an on-going romantic relationship, as opposed to just having gone on one date, when they announced their engagement. Prior to Richard's January 1999 deposition, the prosecutor told Richard that he would need to answer questions about the affair truthfully. The prosecutor said he would cough to signal to Richard when he needed to disclose the affair in response to a question. Richard was asked

if he had any personal interest in the case, during
leposition, and he stated he did not. The prosecutor did
iot signal him to say otherwise. Consequently, White
iever learned of Richard and Tina's affair before his
first criminal trial.

A few months after White was convicted, Tina moved
n with Richard. She then married Richard in July 2000.
At that time, White learned that Tina and Richard had
een having an affair at least during the trial and
erhaps during the investigation. White also learned
hat the prosecutor knew about this. White appealed
is conviction, and the Missouri Court of Appeals
eversed, finding that the prosecutor violated his duty
o disclose exculpatory evidence. White's conviction
was retried on the same charges. During this second
rial, Tina's son's testimony contradicted his mother's
ersion of events, and the jury deadlocked eleven to
ne in favor of acquittal. The judge declared a mistrial.

Vhite was prosecuted a third time, and, while the third
rial was pending, White subpoenaed his adopted son as
defense witness. Before he could testify, however,
ichard called a crisis counselor to report that Tina's
on had disclosed that White had molested him as well,
nd that the son was suicidal. The trial judge deemed
ina's son unavailable to testify, but allowed the son's
estimony from the second trial to be read into record.
he jury acquitted White on all counts after the third
rial.

n the instant action against Richard and Tina, White's
omplaint alleged: malicious prosecution; false arrest;
ommon law negligence; use of unreliable and
raudulent investigatory techniques and procurement

of unreliable and fabricated evidence under 42 U.S.C. § 1983; conspiracy under § 1983; and suppression of exculpatory evidence under § 1983. Richard and Tina McKinley moved for summary judgment on all counts. The district court denied Richard's motion as to the conspiracy claim and the procedural due process claim and granted his motion in all other respects. Tina's motion was denied as to the conspiracy, false arrest, and malicious prosecution claims.

II. *Discussion*

In this interlocutory appeal, Richard argues that the district court erred in denying summary judgment for White's procedural due process and conspiracy claims. Tina also appeals, asserting that the district court erred in denying her summary judgment motion for White's conspiracy, false arrest, and malicious prosecution claims.

A. *Richard's Appeal*

1. *Subject Matter Jurisdiction*

We first address our jurisdiction. White argues that we do not have subject matter jurisdiction over this interlocutory appeal from a denial of summary judgment. We disagree. Although Richard's appeal may resemble an attack on the sufficiency of the evidence, the appeal also asks the purely legal question whether White has shown the existence of a clearly established constitutional right.

"A defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial"; the appealable issue is the purely legal one. *Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). This court does not have jurisdiction to consider an interlocutory summary-judgment qualified-immunity appeal if "at the heart of th[e] argument is a dispute of fact." *Pace v. City of Des Moines*, 201 F.3d 1050, 1053 (8th Cir. 2000). Even if a defendant frames an issue in terms of qualified immunity, we should determine whether he is simply arguing that the plaintiff offered insufficient evidence to create a material issue of fact. *Thomas v. Talley*, 251 F.3d 743, 747 (8th Cir. 2001). Typically, the appealable issue is whether the federal right allegedly infringed was "clearly established." *Id.* at 746-47 (internal citation and quotations omitted).

In addition to some evidentiary arguments, Richard's appeal mainly asks whether he is entitled to qualified immunity for failing to seize a diary containing potentially exculpatory evidence and for failing to disclose his intimate relationship with the ex-wife of the accused who was also the mother of the alleged victim. Richard argues that White possessed no clearly established federal constitutional right infringed by Richard's failures. Given the limited nature of that question, we have subject matter jurisdiction over his appeal.

2. *Procedural Due Process*

Richard first argues that the district court erred in denying his motion for summary judgment on the procedural due process claims based on denial of qualified immunity. We review de novo the district court's denial of qualified immunity. *Clemmons v. Armontrout*, 477 F.3d 962, 965 (8th Cir. 2007).

"To determine whether an official is entitled to qualified immunity we engage in a two-part analysis. The "threshold question" is whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official's conduct violated a constitutional right." *Id.* If a violation could be made out on a favorable view of the parties' alleged facts, the next step is to ask whether the right was clearly established. *Id.* "To determine whether a right is clearly established we ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

The party asserting immunity always has the burden to establish the relevant predicate facts, and at the summary judgment stage, the nonmoving party is given the benefit of all reasonable inferences. *Pace*, 201 F.3d at 1056. If there is a genuine dispute concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment. *Id.* The threshold question then is whether, viewed in the light most favorable to White, the facts as alleged demonstrate that Richard's conduct violated a constitutional right.

The constitutional right implicated by the instant facts is explained in *Brady v. Maryland*: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of prosecution." 373 U.S.

33, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Supreme Court stated in *California v. Trombetta*, with respect to the Due Process Clause of the Fourteenth Amendment: "We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

The right *Brady* describes definitely applies to prosecutors and imposes upon them an absolute disclosure duty. But, *Brady's* protections also extend to actions of other law enforcement officers such as nvestigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). "[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial." *Id.* Consequently, to be viable, White's claim must allege bad faith to implicate a clearly established right under *Brady*.

Upon review, we agree with the district court that the facts alleged here meet the bad faith standard. Treating the facts as alleged to be true, a reasonable juror could find Richard deprived White of a fair trial in bad faith by deliberately steering the investigation to benefit his ove interest, Tina. Richard deliberately withheld from prosecutors the full extent of his relationship with Tina and failed to preserve the alleged victim's diary which did not corroborate the molestation allegations. Failing to preserve the diary deprived White of his right to a fair trial, in part, because he could not testify about the diary without waiving his right not to testify. Whether Richard's failure to disclose the full extent of his relationship with Tina and preserve the diary were done in bad faith are disputed factual questions inappropriate for summary judgment.

Richard argues that the *Brady-derived* right alleged was not clearly established and that there are no cases factually similar that would have put him on notice of White's rights. However, we have held that "the absence of a factually similar case does not guarantee government officials the shield of qualified immunity. . . . [t]he key inquiry in deciding whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."*Moran v. Clarke*, 359 F.3d 1058, 1060-61 (8th Cir. 2004) (internal citations and quotations omitted). We hold that no reasonable police officer in Richard's shoes could have believed that he could deliberately misrepresent the nature and length of his relationship with Tina, or that he could deliberately fail to preserve a child victim's diary containing potentially exculpatory information.

Because Richard is asserting the qualified immunity defense, he has the burden to establish the relevant predicate facts for its application. He has not done so. During this review, we are limited to the facts as alleged by the plaintiff. Given these facts, a reasonable juror could find that Richard deliberately misrepresented his relationship with Tina and that he deliberately failed to preserve the diary in bad faith.

'herefore, we find no error in the district court's denial f qualified immunity for White's due process claim.

. *Conspiracy*

ichard also appeals the denial of summary judgment n White's conspiracy claim. White alleged Richard and 'ina conspired to deprive him of his constitutional ights. To prove a 42 U.S.C. § 1983 conspiracy claim, a laintiff must show: (1) that the defendant conspired vith others to deprive him of constitutional rights; (2) hat at least one of the alleged coconspirators engaged n an overt act in furtherance of the conspiracy; and (3) hat the overt act injured the plaintiff. *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999). The plaintiff s additionally required to prove a deprivation of a onstitutional right or privilege in order to prevail on a 1983 civil conspiracy claim. *Id.*

ichard argues that the conspiracy claim fails because e did not violate any of White's constitutional rights, nd absent a constitutional violation, there is no ctionable conspiracy claim. However, the district court ound that because it denied summary judgment on the rocedural due process claim, the court could not grant ummary judgment on McKinley's conspiracy claim. We gree. The determination that a constitutional violation ould be proven on the due process claim also defeats ichard's qualified immunity defense at this stage for he conspiracy claim.

. *Tina's Appeal*

'ina also filed an interlocutory appeal, arguing that the istrict court erred in denying her summary judgment motion as to the conspiracy, false arrest and malicious prosecution claims.

1. *False Arrest and Malicious Prosecution*

As with Richard, we must first address our jurisdiction. White argues that we do not have pendent jurisdiction to review the district court's ruling on White's false arrest and malicious prosecution claims against Tina in this interlocutory appeal. This time, we agree.

The interlocutory appeal for denial of qualified immunity is a vehicle with limited capacity and cannot accommodate other interlocutory appellate arguments unless they are "inextricably intertwined" with the defense of qualified immunity. *Eagle v. Morgan*, 88 F.3d 620, 628 (8th Cir. 1996). When a ruling on the merits resolves the non-government individual's pendent claims, that individual's appeal is "inextricably intertwined" with the officer's qualified immunity. *Id.* An interlocutory appeal is not inextricably intertwined with the question of qualified immunity if the resolution of the two issues requires entirely different analysis. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1270 (8th Cir. 1996). White's false arrest and malicious prosecution claims against Tina would be inextricably intertwined with Richard's interlocutory appeal if our ruling on the merits of Richard's qualified immunity appeal resolved all of the remaining issues presented by Tina's pendent appeal.

Our ruling on Richard's qualified immunity, however, does not resolve White's claims against Tina. For Tina to be found guilty of maliciously causing false prosecution, White must prove (1) the commencement of a prosecution against the plaintiff; (2) its legal causation or instigation by the defendant; (3) its termination in favor of the plaintiff; (4) want of probable cause by the prosecution; (5) defendant's conduct was actuated by malice; and (6) plaintiff was damaged. *Duvall v. Lawrence*, 86 S.W.3d 74, 84 (Mo. App. 2002). To be found guilty under a theory of false arrest, the evidence must show White was confined against his will and without legal justification. *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814, 819 (Mo. App. 2002). Tina may be liable for false arrest even if she did not actually confine White, if she provided information that formed the basis of the false arrest. *Id.* These issues would not be resolved in Tina's favor on the basis of our merits ruling on Richard's qualified immunity appeal. The facts and legal arguments related to Richard's qualified immunity and Tina's false imprisonment and malicious prosecution claims are not inextricably intertwined. Consequently, we do not have jurisdiction to hear Tina's appeal regarding the false arrest and malicious prosecution claims.

2. *Conspiracy*

We do, however, have jurisdiction over Tina's appeal of the denial of summary judgment as it relates to the 42 U.S.C. § 1983 conspiracy claim. Although § 1983 can only be used to remedy deprivation of rights done under the color of law, a private actor can be liable "under § 1983 for conspiring with state officials to violate a private citizen's right[s]. . . " *Dossett v. First State Bank*, 399 F.3d 940, 950 (8th Cir. 2005). The key inquiry is whether the private party was a willful participant in the corrupt conspiracy. *DuBose v. Kelly*, 187 F.3d 999, 1003 (8th Cir. 1999).

For a claim of conspiracy under Section 1983, the plaintiff need not show that each participant knew "the exact limits of the illegal plan. . . ," but the plaintiff must show evidence sufficient to support the conclusion that the defendants reached an agreement to deprive the plaintiff of constitutionally guaranteed rights. *Larson by Larson v. Miller*, 76 F.3d 1446, 1458 (8th Cir. 1996). "The question of the existence of a conspiracy to deprive the plaintiffs of their constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims." *Id.* Because "the elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided. The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy." *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 743 (8th Cir. 1982).

Tina argues that the district court erred in denying her motion for summary judgment on this conspiracy claim because the facts that the court relied on are not sufficient to support a conspiracy claim. We disagree. Viewing the facts in a light most favorable to White, a reasonable juror could find that Tina and Richard reached a meeting of the minds to withhold exculpatory evidence from prosecutors and White. White offers evidence that Tina and Richard were romantically involved shortly after White was accused, and there is also evidence that Tina and Richard knew each other before the abuse allegations even surfaced. Some evidence suggests that Richard reviewed and returned the potentially exculpatory diary to Tina and that the diary then disappeared. There is also evidence that Tina stood to gain financially from White's conviction. Because the elements of conspiracy are rarely established through means other than circumstantial evidence, and here there is sufficient evidence to support a reasonable inference of conspiracy, summary judgment was not appropriate.

III. *Conclusion*

For the foregoing reasons, the judgment of the district court is affirmed.

Footnotes

[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

[2] The diary was mentioned in one of Richard's initial reports. In a police report dated March 26, 1998, Richard wrote that "I asked [Tina's daughter] if she ever wrote any of the details down in her diary. [Tina's daughter] said that she hadn't because her mom knew where she kept her diary and didn't want her to find out that way."

[3] The prosecutor during White's first trial, testified that a lead investigator is always supposed to attempt to nterview the suspect. This prosecutor testified that if she had known Richard turned down an opportunity to nterview White that would have "raised an eyebrow" about the detective's work. Because Richard did not

interview White, he did not learn the names of the people White was with during the alleged events.

No. 09-1945

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Theodore W. White Jr., Appellee,

v.

Detective Richard McKinley, Individually and in his official capacity, Appellant,

Tina McKinley, Defendant.

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 28, 2010